the mortgage was not validly executed, because Almena Oates, the wife of A. Y. Oates, did not appear before the notary public who purported to have taken the acknowledgment. Judge Taylor, who heretofore decided this cause in this Court, decided that point in favor of the contention of the complainant, but the Supreme Court of Florida reversed said decision and held that said defense was admissible, regardless of the fact of the transfer and assignment of said note and mortgage to the complainant by the original mortgagee. There is no question raised in the argument here as to subrogation. It seems that the Circuit Judge who heretofore decided this cause decided that there was no subrogation. From the evidence in this cause, the Court finds that there is no evidence to warrant any claim of subrogation, nor was it contended in the argument before the Court that the evidence or the record would warrant any claim of subrogation. Likewise, there is no contention on the part of the defendants that the complainant has not proven conclusively the default in the payments of the mortgage indebtedness entitling the complainant to foreclose said mortgage as provided in the bill of complaint, if it is a valid mortgage. Hence, as stated in the beginning, the only question left to be decided in this cause which was argued by counsel is as to whether or not the said mortgage was and is a valid mortgage, and that depends on whether or not it was properly acknowledged, and that depends on a decision on the evidence as to whether or not Almena Oates, the wife of A. Y. Oates, appeared before the notary public who purported to take the acknowledgment.

Very frankly, this Court does not approve of defenses of this character. It is the policy of this Court, and has been the policy of this Court, in situations of this kind, wherever this Court could consistently do so without stultifying himself by making findings contrary to that which he was clearly convinced the record proved, to hold such mortgages good, or in the event that he could not do so, to enforce the lien on some other theory, either by equitable lien in the case of homestead, or a married woman's separate estate, or by subjection of the property to the payment of a debt of a married woman, where that was permissible under the rec-

ord. This Court, however, has repeatedly refused to find the facts with reference to acknowledgment to be contrary to what the record clearly proves to the mind of this Court, merely in order to attempt to prevent defendants from availing themselves of such a defense. I recall distinctly that in many cases this Court has held, even though it very much hated to do so, that the wife did not appear before the notary public and that the mortgage was not validly executed, but in most, if not all cases heretofore, this Court has been able to enforce the payment of all, or the major portion of such indebtedness on other equitable grounds. This Court recalls especially that in the case of Virginia Oates et al. *v.* Prudential Life Insurance Company, and Morrow et al. *v.* Jefferson Standard Life Insurance Company, and Boynton vs. Williams, three cases which went to the Supreme Court and were affirmed, this Court decided that the mortgages were not properly executed mortgages because the wife did not appear before the notary public, and the Court would so have decided, having been convinced that the record proved such to be the case, even if the Court had not been able to have enforced the payment of all, or the major portion of the indebtedness in each of said cases by record and other classes of liens. I think it would be and is the policy of all Courts, where the record will permit it without stultification, to enter such decree as will preclude such defense being successfully made. Nevertheless, it is not the policy of this Court, and I do not think it is the policy of any Court, to deliberately make a finding of fact which the Court considers contrary to all the evidence, simply because some defendant interposes a defense which the Court does not approve of, but which is a perfectly valid and legal defense under the laws of our state. I have carefully considered the evidence in this cause and there can be no doubt in my mind and is no doubt in my mind from the record in this cause, but that Mrs. Almena Oates, the wife of A. Y. Oates, one of the defendants in this cause, did not appear before the notary public who purported to take the acknowledgments of the mortgage held by the complainant in this cause. To my mind, the evidence is too clear and convincing on this point to leave any doubt in the

mind of the Court. The notary public, in substance, testifies that she has no independent recollection of the matter, but attempts to bolster the evidence by saying that it was her habit and custom in the case of mortgages, not to take them unless the party is before her. This part of her evidence, however, is clearly refuted by the testimony of other witnesses. There is the uncontradicted and clean-cut testimony of both A. Y. Oates and Almena Oates that she did not appear before the notary public, and this is corroborated by the testimony of the witness Fuller, and by other evidence in the record. It is quite true that there may be some discrepancies in the testimony of the witness Fuller. It may be even possible that in some of the minor details he might appear to have been trying to remember them most too well. Nevertheless, his testimony is reasonable as to the major question involved as to whether or not Mrs. Oates appeared before the notary public, and it is uncontradicted, and it corresponds with the probabilities made by the record. To my mind, the evidence clearly and convincingly proves beyond any question that the defendant, Almena Oates, did not appear before the notary public whose certificate is appended to the mortgage described in the bill of complaint, and being so convinced from the evidence in this cause, this Court could not and would not attempt to hold otherwise, simply because this Court does not approve of this class of defense in this class of cases. This Court, therefore, finds that the defendant, Almena Oates, did not appear before the notary public whose certificate is appended to the mortgage described in the bill of complaint, that she did not acknowledge same before said notary public, or any notary public, and, therefore, that the said certificate was and is a legal fraud and a nullity, and therefore, this Court finds that the said mortgage was not and is not a properly and validly executed mortgage and is unenforceable, and cannot be foreclosed against the property herein described.

Wherefore, It Is Hereby Ordered, Adjudged And Decreed, that the equities in this cause are with the defendant, A. Y. Oates and Almena Oates, and the bill of complaint in this cause be and the same is hereby dismissed on the merits, and that the costs of this suit, in the sum of $68.35, be and

the same are hereby assessed against the complainant, the New York Life Insurance Company, a corporation.

Done And Ordered At Chambers, in Lakeland, Florida, this 3rd day of August, 1934.

H. C. PETTEWAY,
Circuit Judge.

APPENDIX E.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Complainant.

vs.

A. Y. OATES AND HIS WIFE, ALMENA OATES, *Defendants.*

Bill to Foreclose Mortgage, etc. No. 13201-W-427.

Order.

The above and foregoing cause coming on for hearing upon petition for re-hearing, and the Court being of the opinion that nothing is set forth therein which the Court has not heretofore previously considered,

It Is, Therefore, Hereby Ordered, Adjudged And Decreed that petition filed for re-hearing in this cause be and the same is hereby denied.

Done And Ordered at Chambers in Lakeland, Florida, this 14th day of August, 1934.

H. C. PETTEWAY,
Circuit Judge.

APPENDIX F.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

January Term, A. D. 1935

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES AND HIS WIFE, ALMENA OATES, *Appellees.*

OPINION—Filed April 5, 1935.

An appeal from the Circuit Court for Polk County, H. C. Petteway, Judge.

Bradford G. Williams, Richard M. Naylor, Raymond D. Knight, Henry P. Adair, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellant;
Ira C. Hopper, for Appellees.

PER CURIAM:

In this cause Mr. Chief Justice Whitfield, Mr. Justice Terrell and Mr. Justice Davis are of the opinion that the decree of the Circuit Court should be reversed for further appropriate proceedings while Mr. Justice Ellis, Mr. Justice Brown and Mr. Justice Buford are of the opinion that the decree should be affirmed. When the members of the Supreme Court, sitting six members in a body and after full consultation, it appears that the members of the Court are permanently and equally divided in opinion as to whether the decree should be affirmed or reversed, and there is no prospect of an immediate change in the personnel of the Court, the decree should be affirmed; therefore it is considered, ordered and adjudged under the authority of State ex rel. Hampton *v.* McClung, 47 Fla. 224, 37 So. R. 51, that the decree of the Circuit Court in this cause be and the same is hereby affirmed.

Affirmed.

(s) Whitfield, *C. J.* and Ellis, Terrell, Brown, Buford and Davis, *J. J.* concur.

APPENDIX G.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

January Term, A. D. 1935
En Banc.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Appellant,

vs.

A. Y. OATES And His Wife, ALMENA OATES, *Appellees.*

WHITFIELD, *C. J.*

This suit was brought by the assignee of the mortgagee to foreclose a mortgage by husband and wife upon an estate by the entireties on which their homestead was located. There was a final decree for defendants and complainant appealed. On a prior appeal a final decree for complainant was reversed for further proceedings. Oates *v.* New York Life Ins. Co., 113 Fla. 678, 152 So. 671.

The mortgage and the loan note payable by installments during five years, were dated June 1, 1926, and were assigned to the complainant June 22, 1926, the original mortgagee being Telfair Stockton & Company, a corporation.

In substance the defense interposed was that the mortgage is invalid because the wife did not acknowledge its execution before the officer who made the certificate of acknowledgment attached to the mortgage as shown in the statement of this case.

The court held that the evidence showed the execution of the mortgage was not acknowledged by the wife before the officer who made the certificate of such acknowledgment, and dismissed the bill of complaint.

On this appeal the appellant in effect contends that the evidence does not overcome the official certificate which states that the execution of the mortgage by the wife was acknowledged by her before the officer; and that the ad-

mitted and proved conduct of the husband and wife in the matter of signing, recording and delivery of the mortgage, the receipt of a loan thereon and the payments made on the loan, warrants an adjudication of estoppel of the husband and wife to deny that the wife did acknowledge the execution before the officer, the mortgage being now held by an assignee for value and without notice of any latent defect, if any, in the mortgage that on its face is duly executed by the husband and the wife.

The appellees contend that the evidence clearly shows that the wife did not acknowledge before the officer the execution of the mortgage as required by the constitution and the statutes; and that consequently the mortgage is void and inoperative.

If the mortgage is effectual or ineffectual as to the homestead, it is likewise effectual or ineffectual as to the other property, if any, owned by the mortgagors and covered by the mortgage, the circumstances of the case applying to the mortgage as a whole.

The married woman here is not shown to have been a free dealer under the statute when the mortgage was executed. Secs. 5024 (3218), 5027 (3221) C. G. I.; Lerch *v.* Barnes, 61 Fla. 672, 54 So. 763.

Under the constitution and laws of Florida as set out in the statement, the *due execution* by husband and wife of a mortgage on real estate held by the entireties or on homestead real estate includes

(1) the appropriate signing, under seal, of the mortgage instrument by the husband and the wife, each in the presence of at least two persons who sign the instrument as attesting witnesses;

(2) the acknowledgement by the wife before an officer authorized to take acknowledgements of deeds, separately and apart from her husband, that she executed the identified mortgage instrument freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband;

(3) a certificate of such officer over his or her signature and seal of office, setting forth a compliance with all the

foregoing statutory requirements as to the acknowledgement made before such officer;

(4) delivery of the mortgage instrument.

In order to have the mortgage instrument duly recorded under sections 5698 (3822), 5699 (3823), 5700 (3823) C. G. L., the execution of the mortgage instrument must be acknowledged by the parties executing the instrument, or the execution thereof by such parties must be proven by a subscribing witness thereto, before an authorized officer; and the certificate of the officer before whom the acknowledgement or proof shall be taken shall contain and set forth substantially the matter required to be done or proved to make such acknowledgement of proof effectual.

As shown in the statement, the official certificate appended to the mortgage instrument in this case contains a statement that the husband and wife acknowledged to and before the officer that they executed the mortgage for the purpose therein expressed. This satisfied the requirement of the statute to authorize the mortgage to be recorded.

The official certificate also states that the wife

"upon a separate and private examination, taken and made separately and apart from her said husband, acknowledged before me that she executed said instrument freely and voluntarily, without any compulsion, constraint, apprehension or fear of or from her said husband."

The certificate is duly authenticated; and it, together with the signing under seal of the mortgage instrument by the husband and wife, attested by two witnesses, shows at least prima facie that the provisions of the constitution and the statutes on the subject have ben complied with, whereby the mortgage is to be regarded as valid, unless under the averments of the answer the official certificate of the acknowledgement of execution of the mortgage by the wife is duly overcome so as to render the mortgage invalid.

"Where a married woman signed a mortgage of land in the presence of witnesses and the only contention in avoidance of the mortgage is that she did not acknowledge to or before the officer separate and apart from her husband the

execution of the mortgage, the certificate of the officer of due acknowledgement of the execution of the mortgage by her separate and apart from her husband, will prevail where there is evidence to sustain the certificate, and it is not overcome by clear, strong and convincing testimony." Bank of Jennings *v.* Jennings, 71 Fla. 145, 71 So. 31.

"The fact that a wife was induced to execute a mortgage by fraud and deception on the part of her husband in which the mortgagee did not participate and of which he had no knowledge, does not affect its validity." Smith *v.* Commercial Bank, 77 Fla. 163, 81 So. 154.

Where a mortgage on homestead real estate owned and held as an estate by the entireties, appears upon its face and by the appended official certificate to have been executed and acknowledged by the husband and wife in accordance with the requirements of the constitution and laws of the State, such mortgage instrument is at least prima facie valid as an encumbrance upon the property; and the official certificate of due acknowledgement of the execution of the mortgage instrument by the wife, being quasi judicial in its nature, will stand to sustain the validity of the mortgage until it is overcome as may be authorized by law.

Where in a suit to foreclose such a mortgage, it is admitted or duly proven that the mortgage was signed by both the husband and the wife, but it is averred as a defense that the wife did not appear before or acknowledge the execution of the mortgage before the officer whose certificate states that she did so appear and acknowledge the execution of the mortgage, then, in the absence of estoppel, such averment as a defense may be proven by convincing evidence. Hutchinson *v.* Stone, 79 Fla. 157, 84 So. 151; Randall *v.* Twitchell, 98 Fla. 559, 124 So. 21; Morris *v.* Shepard, 104 Fla. 121, 139 So. 189; Smith *v.* Hogan, — Fla. —, 157 So. 183; Suttle *v.* Wold, — Fla. —, 158 So. 447; Smith *v.* McEwen, decided at this term.

Where it is admitted or duly proven that the wife did appear before the officer concerning the execution of the mortgage by her, she will be estopped to assert that she did not make the statutory acknowledgement of the execution of the mortgage as may be properly stated in the officer's cer-

tificate. But if it be clearly shown by convincing testimony of disinterested witnesses that there was fraud or duress in procuring the execution of the mortgage or in taking acknowledgement of the execution by the wife, in which fraud or duress the holders of the mortgage or their privies participated, or of which fraud or duress they had or could reasonably have had knowledge or notice, the mortgage holders will be estopped to enforce the mortgage. See Shear *v.* Robinson, 18 Fla. 379; Bank of Jennings *v.* Jennings, 71 Fla. 145, 71 So. 31; Smith *v.* Commercial Bank, 77 Fla. 163, 81 So. 154; Rausch *v.* Eqt. L. Assn. Soc., 77 Fla. 846, 82 So. 295; Green *v.* First Nat'l Bank, 85 Fla. 51, 95 So. 231; Herald *v.* Hardin, 95 Fla. 889, 116 So. 863; Morris *v.* Shepard, 104 Fla. 121, 139 So. 189.

In their answer the husband and wife admit that the wife signed the mortgage instrument; but the answer avers that the wife did not appear before the officer and did not acknowledge the instrument in the presence of the officer. On such averment it may be shown by positive, clear, convincing and legally sufficient evidence, as by sufficient competent testimony and corroborating circumstances, that the wife did not appear before the officer who certified that she did appear before him and acknowledge the execution of the mortgage; and such showing may invalidate the mortgage, unless in estoppel it may be and is shown that by reason of the conduct of the wife in knowingly signing the mortgage instrument with the blank certificate of acknowledgement appended thereto and designed to be executed under the law, or by reason of other conduct of the wife concerning the transaction, her husband or his agent was enabled to have the appending certificate of the wife's acknowledgement that she executed the mortgage, authenticated by an officer, thereby making the mortgage valid on its face, upon the faith of which a loan was made.

It is claimed that such conduct and its consequences are shown, for which the husband and wife should be estopped to assert as a defense to the suit that the wife did not appear before or acknowledge before the officer the execution of the mortgage by her. If such estoppel is adjudicated, the official certificate will stand to sustain the mortgage which

on its face is duly executed and acknowledged as required by the constitution and laws of the State.

Without determining whether the evidence justifies the finding of the chancellor that the wife did not appear before the officer and did not acknowledge before any officer that she executed the mortgage, the decree should be reversed, because an issue of estoppel was made and not adjudicated by the court, though such issue of estoppel was referred to in grounds of the petition for rehearing which the chancellor by order denied; and such order is appealed from and assigned and argued here as error.

It is alleged that a previous mortgage to another party was given by the husband and wife upon the same property and that the proceeds of the present mortgage loan on the property were used, or procured on the representation that the same would be used, in the payment of the previous mortgage loan, wherefore it is claimed that the original mortgagee and its assignee, the complainant, are subrogated to all the rights, titles and interests which the mortgagee in the previous mortgage had. But the right of subrogation so asserted was not duly shown to exist.

Unlike numerous previous cases, estoppel of the defendants is pleaded in this case; and evidence relating thereto was adduced. The doctrine of estoppel is a part of the common law of the State adopted by statute, see 87 (71) C. G. L.; and the constitution does not forbid the operation of such law where duly adjudicated.

A married woman in proper cases may be estopped by her conduct concerning the execution or acknowledgment of instruments affecting real estate in which she is interested. See Maiben *v.* Bobe, 6 Fla. 381; Hobbs *v.* Frazier, 61 Fla. 611, 55 So. 848; Ponce de Leon Fountain of Youth Co. *v.* Day, 90 Fla. 197, 105 So. 814; Phillips *v.* Lowenstein, 91 Fla. 89, 107 So. 350; Mexican Rubber Co. *v.* Ackley, 101 Fla. 552, 134 So. 585; Kansas City Life Ins. Co. *v.* Harroun, 44 Idaho 643, 258 Pac. 929; Ehle *v.* Looker, 182 Mich. 248; Hamling *v.* Aetna Life Ins. Co., 34 Fed. (2nd) 112; 32 A. L. R. 737.

In Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391, 394, it is said:

"This court in an early day and in a well considered case, used the following language:

'The technicalities incident to an estoppel, especially *in pais*, are gradually giving way to considerations of reason and practical utility; and the courts of the present day seem disposed to give force and efficiency to a doctrine which is based upon principles of justice and the purest morality.' Camp *v.* Moseley, 2 Fla. 197, text.

"From cases cited above, and numerous others adjudicated, the law of estoppel may be briefly laid down as follows:

1. Words and admissions, or conduct, acts and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things.

2. In which the person so speaking, admitting, acting and acquiescing, did so willfully, culpably or negligently.

3. By which such other person is or may be induced to act so as to change his own previous position injuriously."

See also Warner *v.* Watson, 35 Fla. 402, 17 So. 654; Johnson *v.* Elliott, 64 Fla. 318, 59 So. 944; First Nat. Bk. *v.* Ashmund, 33 Fla. 416, — So. —.

This suit does not relate to title, but to the recovery of money loaned upon the faith of a mortgage instrument which appears on its face to be duly executed.

Payment of the debt will extinguish the claim of a lien and prevent foreclosure decree and sale of the property. Complainant assignee of the mortgage for value, is not at fault; and defendants have received a loan which if repaid or otherwise settled will satisfy the demand for repayment of the loan.

In McClure *v.* American National Bank, 67 Fla. 32, 64 So. 427, estoppel was decreed upon the face of the note and mortgage held by an assignee in due course. Here the estoppel asserted is predicated upon the conduct of the mortgagors which it is in effect alleged operated to the detriment of a bona fide assignee for value of a mortgage

alleged to have been defectively executed by the mortgagors, but which mortgage is valid on its face. See First National Bank *v.* Ashmead, 33 Fla. 416, 14 So. 886; Hutchinson *v.* Stone, 79 Fla. 157, 84 So. 151; McEwen *v.* Schenck, 108 Fla. 119, 146 So. 839; Flowers *v.* Schenck, 110 Fla. 256, 148 So. 581. In Cobb *v.* Bear, 57 Fla. 370, 49 So. 29, the question of estoppel was not adjudicated.

In Wilkins *v.* Lewis, 78 Fla. 78, 82 So. 762, the husband did not join the wife in executing a mortgage on her separate property, and the wife was not a free dealer.

In the following cases the transaction had reference to conveyances, and not to mortgages. See Carn *v.* Haisley, 22 Fla. 317; Walling *v.* C. & C. Groc. Co., 41 Fla. 479, 27 So. 46; Adams *v.* Malloy, 70 Fla. 491, 70 So. 463; Shad *v.* Smith, 74 Fla. 324, 76 So. 897; Wright *v.* Wright, 75 Fla. 7, 77 So. 616; Phillips *v.* Lowenstein, 91 Fla. 89, 107 So. 350; McDonald *v.* McDonald Holding Co., decided at this term.

Reversed for further appropriate proceedings.

Terrell and Davis, *J. J.*, and Johnson, Circuit Judge, concur.

Brown and Buford, *J. J.*, dissent.

APPENDIX H.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

January Term, A. D. 1935, en banc.

New York Life Insurance Company, a Corporation, *Appellant,*

vs.

A. Y. Oates and His Wife, Almena Oates, *Appellees.*

Brown, *J., dissenting:*

This case has heretofore been before us on an appeal from a decree rendered in favor of the complainant in the court below, New York Life Insurance Co., which decree was reversed and cause remanded. See Oates *v.* New York Life Insurance Co., 113 Fla. 678, 152 So. 671.

As I read the chancellor's carefully prepared opinion rendered in connection with his final decree after the retrial of the case in the court below he had considered the question of estoppel, and he also overruled a petition for rehearing filed by the New York Life Insurance Company which was largely based upon the doctrine of estoppel. In his order overruling said petition for rehearing, the chancellor stated that nothing was set forth therein which the court had not previously considered.

I think therefore, that the only thing for us to consider on this appeal, is whether or not the record shows sufficient facts to estop Mrs. Oates from interposing the defense to the mortgage which was interposed. We are not concerned so much with the chancellor's reasons if his conclusion and decree is correct.

The chancellor in his opinion commented upon the testimony and stated that it undoubtedly shows that Mrs. Oates never appeared before the Notary who took the acknowledgment, and I take it that the majority opinion does not intend or purport to overthrow this finding of the chancellor on the evidence. Under our well established rule, we would not be authorized to reverse the chancellor's findings on the facts unless they were clearly erroneous. That the chancellor was not inclined to reach this conclusion from the facts unless the evidence compelled him to do so is shown by the following quotation from his opinion:

"Very frankly, this Court does not approve of defenses of this character. It is the policy of this Court, and has been the policy of this Court, in situations of this kind, wherever this Court could consistently do so without stultifying himself by making findings contrary to that which he was clearly convinced the record proved, to hold such mortgages good, or in the event that he could not do so, to enforce the lien on some other theory, either by equitable lien in the case of homestead, or a married woman's separate estate, or by subjection of the property to the payment of a debt of a married woman, where that was permissable under the record. This Court, however, has repeatedly refused to find the facts with reference to acknowledgments to be contrary to what the record clearly proves to the mind of this Court,

merely in order to attempt to prevent defendants from availing themselves of such a defense. I recall distinctly that in many cases this Court has held, even though it very much hated to do so, that the wife did not appear before the notary public and that the mortgage was not validly executed, but in most, if not all cases heretofore, this Court has been able to enforce the payment of all, or the major portion of such indebtedness on other equitable grounds. This Court recalls especially that in the case of Virginia Oates et al. *v.* Prudential Life Insurance Company, and Morrow et al. *v.* Jefferson Standard Life Insurance Company, and Boynton *v.* Williams, three cases which went to the Supreme Court and were affirmed, this Court decided that the mortgages were not properly executed mortgages because the wife did not appear before the notary public, and the Court would so have decided, having been convinced that the record proved such to be the case, even if the Court had not been able to have enforced the payment of all, or the major portion of the indebtedness in each of said cases by record and other classes of liens. I think it would be and is the policy of all Courts where the record will permit it without stultification, to enter such decree as will preclude such defense being successfully made. Nevertheless, it is not the policy of this Court, and I do not think it is the policy of any Court, to deliberately make a finding of fact which the Court considers contrary to all the evidence, simply because some defendant interposes a defense which the Court does not approve of, but which is a perfectly valid and legal defense under the laws of our state. I have carefully considered the evidence in this cause and there can be no doubt in my mind and there is no doubt in my mind from the record in this cause, but that Mrs. Almena Oates, the wife of A. Y. Oates, one of the defendants in this cause, did not appear before the notary public who purported to take the acknowledgments of the mortgage held by the complainant in this cause. To my mind, the evidence is too clear and convincing on this point to leave any doubt in the mind of the Court."

The chancellor evidently considered carefully every phase of the testimony.

Unless the mere signing of the mortgage by Mrs. Oates can estop her from questioning the validity of the notary public's certificate of acknowledgment upon the grounds that she never appeared before such notary, the evidence in the case, as I understand it, is not sufficient to show estoppel as against Mrs. Oates. And, to hold that the mere signing of the mortgage would estop a married woman from questioning the validity of a certificate of acknowledgment which was taken by an officer before whom the party executing the mortgage never appeared, would defeat the purpose of the constitutional and statutory provisions on that subject which are referred to in the majority opinion. (Sections 1 and 4 of Art. X and Sec. 1 of Art. XI of Constitution, and Sec. 5676 C. G. L.) I think that Section 5676 C. G. L. plainly establishes a legislative policy to the effect that to render a conveyance or mortgage "effectual" to pass a married woman's estate or right, she must acknowledge before some officer authorized to take acknowledgments of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and that the officer's certificate must set forth all the foregoing requirements.

Undoubtedly, a married woman can estop herself to question the validity of the certificate of acknowledgment in various ways, but the mere signing of the mortgage or deed involved, under the circumstances shown by this case, is not sufficient, in my judgment, to create such estoppel. Like the chancellor below, I do not look with favor upon defenses of the sort interposed in this case, except where the wife has plainly been imposed upon and compelled to sign a mortgage or deed against her will. But we must have respect for, and enforce, the plain provisions of our constitution and statutes, and the public policy therein expressed, where, as here, the married woman took no part in the negotiation of the loan and received none of the money and where she never appeared before the notary who pretended to take her acknowledgment. The testimony also strongly indicates that she did not know that the mortgage covered her home when she signed it.

Frankly, I wish that I might reach a different conclusion but it seems to me that this conclusion is inevitable under the law and the facts in this case, and that the decree of the chancellor should therefore be affirmed.

ELLIS, *J.*, concurs in the conclusion.
BUFORD, *J.*, concurs specially.

APPENDIX I.

IN THE SUPREME COURT OF FLORIDA.

January Term A. D. 1935.

Division B.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES and His Wife, ALMENA OATES, *Appellees.*

BUFORD, *J.*, *dissenting:*

In addition to what has been said by Mr. Justice Brown, in which I concur, I wish to say that I think this Court should either definitely adhere to the rule stated in Mc-Ewen et ux. *v.* Schenck, 108 Fla. 119, 146 Sou. 839, or else overrule what was said in that opinion and adopt the rule which the present writer stated as his reason for dissenting that case, that is that the testimony of the interested husband and wife alone should be held insufficient to overcome the certificate of acknowledgment supported by the sworn testimony of the officer making the same.

I am of the opinion that the sworn testimony of the officer that he did take the acknowledgment could add nothing to the proof of verity of the certificate. It is well settled that he could not be heard to impeach the certificate. Therefore, he could only be heard to testify one way and in that he only re-affirms what he has already said in the certificate.

This case was then before this Court on a former appearance (see 113 Fla. 678, 152 Sou. 671), reversed on authority

of Menendez et al. *v.* Rodriquez, 106 Fla. 214, 143 Sou. 223, and McEwen et ux. *v.* Schenck, supra.

The chancellor in entering his decree after the mandate went down followed the law as enunciated in those cases, and as enunciated in the headnotes of those cases and unless we overrule what was said in those cases, there is no justification in reversing the decree of the Chancellor entered in conformity therewith.

ELLIS, *J.*, concurs.

APPENDIX J.

IN THE SUPREME COURT OF FLORIDA.

January Term A. D., 1935.

Friday, April 5, 1935.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Appellants,

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

AN APPEAL FROM THE CIRCUIT COURT FOR POLK COUNTY.

This cause having heretofore been submitted to the Court on the Transcript of the record of the decree herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said decree; it is, therefore, considered, ordered and decreed by the Court that the said decree of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant his costs by him in this behalf expended, which costs are taxed in the sum of $—, all of which is ordered to be certified to the Court below.

The opinion of the Court in this cause was this day ordered to be filed.

APPENDIX K.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

June Term, A. D. 1935.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellants,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

ON RE-HEARING GRANTED.

Opinion filed January 13, 1936.

An Appeal from the Circuit Court for Polk County, H. C. Petteway, Judge.

Bradford G. Williams, Richard M. Naylor, Raymond D. Knight, Henry P. Adair, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellant.

Ira C. Hopper, for Appellees.

Per CURIAM:

This case was originally decided by an evenly divided Court on April 5, 1935. Afterward, a rehearing was granted and the case argued before the Supreme Court sitting *en banc.* On the rehearing Mr. Justice Ellis was absent on account of illness, and Mr. Circuit Judge John B. Johnson, of the Second Judicial Circuit was, by order of this Court, duly selected to sit as a member of this Court in substitution for Mr. Justice Ellis.

On re-argument of this case, a majority of the Court consisting of Mr. Chief Justice Whitfield, Mr. Justice Terrell, Mr. Justice Davis and Circuit Judge J. B. Johnson are of the opinion that the principles of law set forth in the opinion of Mr. Chief Justice Whitfield, as filed herein on April 5, 1935, are correct and applicable to this case, but that in view of the confusion that has heretofore prevailed in the interpretation of this Court's first opinion in this case as reported under the style of *Oates* v. *New York*

Life Ins. Co., 113 Fla. 678, 152 Sou. Rep. 671, when considered in the light of what has been said in the opinion of Mr. Chief Justice Whitfield hereinbefore mentioned, as well as the issues that appear to have been submitted for decision in the Court below and not therein specifically and in terms ruled on, they are of the opinion that the ends of justice will be best subserved by now vacating the decree appealed from, without prejudice, in order that the cause may be remanded to the Circuit Court for rehearing and reconsideration in the light of the opinion of Mr. Chief Justice Whitfield.

Mr. Justice Brown and Mr. Justice Buford have heretofore stated their views in this case and from their several opinions they have not receded.

Let judgment be entered on rehearing vacating and reversing the final decree without prejudice, and without costs to either side, with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition, after a full-rehearing and reconsideration of all of the issues of law and fact in the light of the opinion of this Court hereinbefore approved by a majority of the Court as the applicable law of this case to be considered and applied to its disposition.

Whitfield, *C. J.* and Terrell, Brown, Buford and Davis, *J. J.* Concur.

APPENDIX L.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1936.

Monday, January 13, 1936.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, et al., *Appellants,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

A rehearing having been granted in this cause and the case having again been argued before the Court and the

Court being fully advised in the premises it is considered, ordered and adjudged by the Court that judgment shall now and is hereby entered on the said rehearing vacating and reversing the final decree without prejudice, and without costs to either side, with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition, after a full re-hearing and re-consideration of all of the issues of law and fact in the light of the opinion of this Court hereinbefore approved by a majority of the Court at the applicable law of this case to be considered and applied to its disposition.

The Opinion of the Court in this cause was this day ordered to be filed.

APPENDIX M.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1936.

Monday, January 13, 1936.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, et al., *Appellants,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

AN APPEAL FROM THE CIRCUIT COURT FOR POLK COUNTY.

A rehearing having been granted in this cause and the case having again been argued before the Court and the Court being fully advised in the premises it is considered, ordered and adjudged by the Court that judgment shall now and is hereby entered on the said rehearing vacating and reversing the final decree without prejudice, and without costs to either side, with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition, after a full re-hearing and re-consideration of all of the issues of law and face in the light of the opinion of this Court hereinbefore approved by a majority

of the Court at the applicable law of this case to be considered and applied to its disposition.

The Opinion of the Court in this cause was this day ordered to be filed.

APPENDIX N.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

January Term, A. D. 1936.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

Opinion filed March 9, 1936.

An Appeal from the Circuit Court for Polk County, H. C. Petteway, Judge.

Bradford G. Williams, Richard M. Naylor, Raymond D. Knight, Henry P. Adair, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellant;

Ira C. Hopper, B. K. Roberts, H. H. Wells and William K. Whitfield (of Tallahassee) for Appellees.

Per CURIAM:

No mandate has been given to the Chancellor to decide the facts of this controversy in the Court below in any particular way. Our last decision in effect does nothing more than to grant a rehearing before the Chancellor of the whole controversy. While in deciding the case on such rehearing, the Chancellor is bound to follow and apply the applicable rules of law as last set forth in the opinion of Mr. Chief Justice Whitfield, which was agreed to by a majority of the Supreme Court, the decision of this case itself still remains with the Chancellor, insofar as the

weight and legal effect of the evidence in the case may be concerned when it is again heard by him on the rehearing we have in effect ordered in the Court below.

It is not within the province of the Supreme Court to give any additional directions to the Chancellor in the case, other than such as have already been set forth in our previous opinions and in our mandate, therefore the motion for same is denied.

Whitfield, *C. J.*, and Ellis, Terrell, Brown, Buford and Davis, *J. J.* Concur.

APPENDIX O.

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA, IN CHANCERY.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Complainant,

vs.

A. Y. OATES and His Wife, ALMENA OATES, *Defendants.*

BILL TO FORECLOSE MORTGAGE AND FOR OTHER RELIEF

#13201-W-427.

FINAL DECREE.

The above and foregoing cause came on for final hearing, the evidence in said cause and the records were submitted to the Court and the cause was argued by the solicitors for the respective parties.

In my opinion the effect and the language of the first opinion of the Supreme Court in the above cause was and is to hold that a mortgage on a homestead signed by the wife, where she did not appear before the Notary Public as shown in the certificate of acknowledgment appended to said mortgage, is utterly void and that such married woman could not be estopped from claiming the benefit of said failure to appear before the Notary Public and thereby

defeat the mortgage. That opinion went even further and held such estoppel would not lie even where the mortgage was transferred to the third party, and I think this undoubtedly was the law as laid down in a long line of decisions by the Supreme Court of Florida up to and including the first opinion in this case.

Therefore, said cause came back to this Court with the law in my judgment settled by said opinion and preceding opinions to the effect that estoppel would not lie against the married woman in this case and could not be made to lie. Accordingly, entertaining this view of the law, this court made a finding of facts and entered a decree for defendants, decreeing the mortgage in this case to be invalid. In that finding of facts the court found and set out among other things that the defendant, Almena Oates, signed the said mortgage, but did not appear before the Notary Public as stated in his certificate and did not acknowledge the execution of said mortgage before any Notary Public; and that said A. Y. Oates took said mortgage when signed by himself and wife and had a Notary Public to append the certificate of acknowledgment thereon as appears in the mortgage and delivered it to the assignor of the complainant, apparently properly and regularly executed and acknowledged, and received therefor the sum of Fifteen Thousand Dollars ($15,000.00), the amount of the loan.

At the original final hearing this court considered the question of estoppel and was of the opinion that the first opinion in this case and decisions generally of the Supreme Court of Florida theretofore had settled the law that there could be no estoppel against the said Almena Oates under these facts from claiming the said mortgage from being invalid because of her non-appearance before the Notary Public; and hence this Court felt that there was nothing for this Court to do save and except to enter a decree, based on said findings, that the mortgage was invalid.

Subsequently the said cause again went to the Supreme Court and the Supreme Court first decided to affirm the decree of this court by a divided opinion, three of the judges being for affirmance and three for reversal. It appears that three of the judges agreed with the view of this

court that the law had been settled. Thereafter on a petition for rehearing with one of the judges absent and a Circuit Judge sitting in his place the decree of this Court was reversed by a four to two decision. In connection with the divided court affirmance first announced there were several opinions written, one of which was by Mr. Justice Whitfield. I construe that opinion to differ from the law as I understand it to have theretofore been laid down by the Supreme Court of Florida in other cases and in this cause and to hold as follows: that in the case of a mortgage on the home place signed by the wife and husband where she does not in fact appear before any Notary Public, *but the husband takes the said mortgage so signed by his wife and has an acknowledgment apparently good on its face appended thereto, and takes same to the mortgagee therein named, and secures money for a loan on said property, that the wife under such facts is estopped from claiming that she did not appear before the Notary Public and that the mortgage is therefore invalid.* I have carefully considered this opinion and it seems to me that that is definitely what it holds. Thereafter upon the reversal of the opinion in this cause on petition for rehearing it was set out that the opinion of Mr. Justice Whitfield above referred to should be the law in this case.

Subsequently on a special petition for rehearing, filed by the defendants in this case, setting out that they were fearful that this court would construe the decisions of the Supreme Court aforesaid to require this court to enter a decree for the complainant, the Supreme Court entered a supplemental opinion concurred in by the original two dissenting Justices setting out that this court was not required by the opinion to enter any particular decree *but that it should make its decree conform to the opinion aforesaid of Mr. Justice Whitfield. The effect of this order without any dissenting opinion is in my judgment to order this court to accept as a law of this case the opinion aforesaid of Mr. Justice Whitfield and to enter a decree in accordance with the law as laid down in said opinion, which in my judgment is equivalent to being a mandatory requirement that this court hold that under the law as stated by the*

Supreme Court of Florida in this cause the defendant, Almena Oates, is estopped from claiming that she did not appear before the Notary Public whose certificate is appended to the mortgage in this cause, and therefore to hold the mortgage valid and to foreclose same. For the reason that this Court in its original opinion settled the facts in this cause and the Supreme Court of Florida had these facts before it in the said final decree and found no fault with this court's findings in establishing the said facts as the facts in this case, this court construes the said opinion of Mr. Justice Whitfield to set out that under the facts as originally found by this court in its aforesaid final decree herein, the defendant, Almena Oates, is estopped from asserting that she did not appear before the Notary Public in question, and consequently estopped from having said mortgage decreed invalid because of said non-appearing before said Notary.

In the said final decree the court found and does hereby again find the facts in the case to be as follows:

"There is no question in this cause but that Mr. and Mrs. Oates both signed the mortgage and there is no question of duress or fraud in procuring the signature of Mrs. Oates. Likewise, there is no question but that Mr. Oates got the money secured, or attempted to be secured, by the mortgage. Likewise, there is no question but that Mr. Oates took the mortgage from the office of Telfair Stockton Company to have same executed and returned same to the Telfair Stockton Company signed by himself and wife and showing on its face to be properly witnessed and acknowledged. The property described in the mortgage, the Court finds to be the homestead of the defendant, A. Y. Oates. He is the head of a dependent family, residing in the dwelling house on said property with his wife, and was the head of a dependent family and residing in the residence on said property with his wife at the time the application for the said loan was made and prior thereto, and from then continuously during the period of the negotiations of said loan and of the closing of said loan and of the execution and delivery of the said mortgage, and until the time of the taking of the testimony herein."

The court also finds that the mortgage was and is in default as contended in the Bill of Complaint and that the complainant is entitled to foreclose same if the defendant, Almena Oates, is estopped from claiming the said mortgage to be invalid because she signed same at the request of her husband, the defendant, A. Y. Oates, and because the said A. Y. Oates took same and had a certificate of acknowledgment regular on its face made thereto and delivered same and secured the money as aforesaid.

There is some question of attempted distinction in the aforesaid opinion of Mr. Justice Whitfield with reference to a mortgage and a deed on the homestead, but this court cannot see any differentiation between the two and is of the opinion that the same law would apply to a deed as would apply to a mortgage so far as an estoppel is concerned. That is however immaterial here.

The Supreme Court of Florida apparently in a long line of decisions held that estoppel in cases of this kind under facts as herein stated would not lie against a married woman because the effect of upholding such an estoppel would be to execute the instrument in question by a means other than that required by the Constitution. Whereas now in the decision as it seems to be settled in this cause, the Supreme Court of Florida holds that the effect of allowing a married woman, under facts such as those in this case, to be estopped, is not to execute the instrument contrary to the provision of the constitution but merely to estop her from claiming that it was not so executed because she signed same at the request of her husband who thereafter took it before a Notary Public and had an apparently regular certificate of acknowledgment made thereto and delivered it to the party to whom it was made and secured money thereon.

I am of the opinion that this is what the Court should have held originally in the earlier decisions because it seems to me to be the more proper and correct view of the law. Nevertheless, I had not been able at the time I entered the first decree in this cause, and I am still unable to persuade myself that the law, as laid down by the

Supreme Court of Florida up to the last decisions in this cause permitted estoppel to lie in cases of this kind.

The estoppel in this case must be based solely upon the facts as found, to-wit: that the defendant, A. Y. Oates, took the mortgage in this cause to his wife and she signed same and handed it back to him and he took it before a Notary Public and had him make the certificate appended to the mortgage, and then took it back to the claimant's assignor from whom he received the mortgage and delivered it, apparently regularly and properly executed, and secured the money therefor.

It is not made to appear that Mrs. Oates knew the paper she signed covered the home place. In fact, she testified that she did not know that it was on the home place. On the other hand, there is no contention that anything was done by the defendant, A. Y. Oates, to make her believe it was not the home place, or to keep her from reading it or ascertaining what it covered if she had so desired. It does appear from her testimony that she trusted her husband, A. Y. Oates, implicitly and signed the mortgage at his request without asking anything about it.

Counsel for the defendants still contend strenuously that under the law as heretofore laid down by the Supreme Court in other cases, and in the first opinion in this case, that such a statement of facts could not constitute an estoppel, but as heretofore stated after careful consideration this court is of the opinion that under the aforesaid opinion of Mr. Justice Whitfield such statement of facts does constitute an estoppel against defendant, Almena Oates, in this cause, and this court is of the opinion that the *united court has ordered said opinion of Mr. Justice Whitfield to stand as the law in cases of this kind and in this particular case, and has ordered this court to enter a decree in accordance therewith.* Consequently, this court is of the opinion that this court is required for the reasons above stated to hold that the defendants are estopped from setting up the defense of non-appearance before the Notary and are estopped from claiming the mortgage invalid on that ground, and for the foregoing reasons this court is of the opinion that complainant is entitled to foreclose its said mortgage in this cause.

At the request of the complainant, the court makes the following additional Findings of Fact:

(a) That at the time that the defendant, Almena Oates, signed the said mortgage instrument there was a blank certificate of acknowledgment appended thereto immediately below and upon the same sheet with the blank provided for her signature and that of her husband, which was in proper form to be executed under the law, and which was the certificate subsequently made and executed by the Notary.

(b) That at the time that said A. Y. Oates delivered the said mortgage to said Telfair Stockton and Company, the said note and the said mortgage were fair and regular upon their face, appeared to have been duly executed and acknowledged by both Oates and his wife in the manner prescribed by law, and in such manner as to entitle them to record in the public records, and that the same were filed by Telfair Stockton and Company for record and were recorded in the public records of Polk County, Florida, on June 18th, 1926.

(c) That on June 22nd, 1926, the complainant, New York Life Insurance Company, purchased the note and mortgage from Telfair Stockton and Company at par; that neither at the time of the delivery by the said A. Y. Oates of the said note and mortgage to the said Telfair Stockton and Company, nor at the time of the delivery of them by Telfair Stockton and Company to the complainant, New York Life Insurance Company, did the said Telfair Stockton and Company of the New York Life Insurance Company have any knowledge or notice, of any defect in the said note or mortgage, or in the notarial certificate appended thereto.

(d) That during the period of the late Florida real estate boom, the defendant, Almena Oates, had executed with her husband a large number of mortgages and deeds covering parcels of property in Polk County, Florida (estimated by A. Y. Oates to be five hundred) without appearing before a Notary in a single instance.

The above special Findings of Fact in the opinion of the Court add nothing to the original findings that might be material to a decision for the reason that it seems to the Court under the opinion of Mr. Justice Whitfield that Finding (a) is not necessary to a creation of the estoppel herein decreed and adds nothing thereto. Mrs. Oates may or may not have known or understood what the said blank was. And as to Finding (b), it is all included in the original specific finding save and except the recording of the mortgage which is immaterial in this particular case. And as to Finding (c), it adds nothing save and except a specific finding that neither the complainant nor its assignor at the time they respectively took the notes and mortgage had any notice or knowledge of any defect in the execution of the note and mortgage. It seems to me that this was necessarily included in the original finding that said mortgage was taken out and returned to Telfair-Stockton Company apparently regular in every way. It would necessarily follow that neither Telfair-Stockton Company nor New York Life Insurance Company had any knowledge of any such defect unless there was some evidence and finding to that effect. And as to Finding (d), it does not seem to the court to be material in the question of the estoppel, the estoppel if any necessarily being based on the defendant, Almena Oates, allowing the mortgage to be put into circulation by her husband and obtaining the money thereon as found in the original Finding of Fact. It seems to me that this finding goes more to the substantiation of the finding that she did not appear before a notary public than to any other item. However, the court makes the said findings specifically, because they are undoubtedly established by the evidence in the case, at the request of complainant for whatever they may be worth. In making Findings (b) and (c), however, the court makes it clear that it does not intend thereby to find that the New York Life Insurance Company is a bona fide purchaser for value without notice from Telfair-Stockton Company. In view of the previous decisions in this case, it does not seem that such a finding would be material anyway, and that the only material point is whether or not, regardless of the relationship that may have existed between Telfair-Stockton Company and New York Life Insurance Company, neither

of said companies knew of or had notice of any defect of any kind or character in the note and mortgage at the time it respectively acquired same by delivery and assignment as aforesaid or for a long period of time after the assignment was made to the New York Life Insurance Company. And this is as far as the Court intended to go in making its Finding (c).

Now, therefore, upon consideration thereof, it is Ordered, Adjudged, and Decreed:

1. That the equities of this cause are with the complainant and against the defendants, for the reasons aforesaid, and that the mortgage held by complainant should be foreclosed.

2. That there is due the complainant for principal and interest the sum of Thirteen Thousand and Fifty-seven and 96/100 ($13,057.96) together with interest thereon from the 1st day of April, A. D. 1930, to the date hereof, at the rate of eight per centum (8%) per annum, in the sum of Six Thousand Five Hundred Seventy-two and 46/100 Dollars ($6,572.46), making the total sum of Nineteen Thousand Six Hundred Thirty and 42/100 Dollars ($19,630.42), due the complainant for principal and interest; there is also due the complainant the sum of Nineteen and 60/100 Dollars ($19.60) for the cost of re-certification of the abstract of title; and the further sum of One Thousand Five Hundred One and 75/100 Dollars ($1,501.75) as a reasonable sum to be allowed for the services of complainant's solicitors in this cause, as and for attorney's fees, and the complainant is further entitled to recover in this action all the costs and expenses incurred and now or hereafter taxed in this suit, including all amounts heretofore or hereafter earned by the Special Master hereunder for his lawful fees and commissions, and that all of these several sums are secured by the lien of said mortgage herein foreclosed, and the said mortgage herein foreclosed is hereby decreed and held to be a valid and subsisting mortgage, and prior and superior to the rights, claims and interests of the defendants in the property hereinafter described and ordered to be sold in default of the payment of the sums so decreed to be due;

3. That unless the defendants herein or someone for them forthwith pay to the Special Master herein the said several sums so decreed to be due and to be paid as aforesaid, and if the several sums mentioned shall not be paid forthwith to the said Special Master, then that the mortgaged property situate in the County of Polk, State of Florida, and described in the Second Amended Bill of Complaint, to-wit:

Lots numbered Twenty-two (22) and Twenty-three (23) in Block numbered Two (2) of Casa Bella, a subdivision of Lakeland, Florida, according to map or plat thereof filed and recorded in Plat Book 8, page 1, of the Public Records of Polk County, Florida, said subdivision being sometimes referred to as Everhart and Barnes Second Addition to Lakeland, Florida,

be sold to pay and satisfy such sums by said Special Master at public outcry to the highest and best bidder or bidders for cash on some legal sales day of this Court during the legal hours of sale in front of the front door of the Polk County Court House, in the city of Bartow, County of Polk, State of Florida;

4. That Kerfoot Bryant, Esquire, a practicing solicitor of this Court, be and he is hereby appointed as Special Master herein to execute this Decree, and that such Special Master is directed to advertise the sale to be made under this Decree, by causing notice of the time and place thereof, together with the foregoing description of the mortgaged lands and premises, to be sold hereunder, to be published once each week for four (4) consecutive weeks prior to the date of such sale in a newspaper published in said County of Polk, State of Florida;

5. That upon such sale being made as aforesaid, the Special Master shall collect and reduce to possession the proceeds of such sale, and that the complainant herein is hereby permitted and allowed at such sale to bid as it may be advised on the property to be sold at such sale, and that if the complainant shall be the purchaser of such property at such sale, the Special Master aforesaid is authorized and directed to allow and credit the complainant on said bid for such

property at such sale the sums due and payable to it by the defendants under this decree, or such portions thereof as may be necessary or required to fully pay its bid for said property.

6. That out of the proceeds of such sale, the Special Master aforesaid shall first pay:

(a) All costs and expenses of these proceedings including his own fees for such sale and including the fees allowed the complainant for the services of its solicitors herein;

(b) The amount hereinabove found to be due complainant for principal and interest, viz., Nineteen Thousand Six Hundred Thirty and 42/100 Dollars ($19,630.42) and the further sum of Nineteen and 60/100 Dollars ($19.60) for the cost of re-certification of the abstract of title, together with the interest on said sum from the date hereof at six per centum (6%) per annum to the date of said sale.

and that in the event of any excess of such proceeds of sale over and above the amounts necessary to make the payments aforesaid, such over plus, if any, shall be paid into the Registry of the Court to await its further order herein, and that in case of any deficiency of such proceeds of sale, the Special Master aforesaid shall apply the same in the order specified above as far as the same will apply, making notice and report of such deficiency and amount thereof in his report of the same to this Court.

7. That upon the sale being made as aforesaid, the Special Master herein shall forthwith report the same, and all of his acts and doings in connection with the execution of this decree, to this Court, for confirmation and approval thereof.

8. That upon such sale being made as aforesaid, and upon the confirmation thereof by this Court, the defendants, A. Y. Oates and Almena Oates, his wife, and all other persons having or acquiring any interest in said mortgaged property since the commencement of this suit, and all persons claiming by, through or under said defendants, or any of them, all and singular, be forever barred and foreclosed of and from any and all right, title, interest or equity of re-

demption in the mortgaged property aforesaid, and every part thereof, and the Special Master shall execute and deliver a good and sufficient deed conveying said lands to the purchaser at such sale, and that upon the production of said Special Master's deed and a copy of this decree, all persons in possession of said property, or any part thereof, do surrender and deliver up the same to the purchaser at such sale, or to his agent or servants thereunto duly authorized.

9. That this Court hereby retains jurisdiction of this cause and grants permission to the complainant to apply to this Court for such further orders and decrees herein (including application for deficiency) as may be equitable and necessary.

Done and Ordered In Chambers at Lakeland, Polk County, Florida, this 15th day of July, A. D. 1936.

H. C. PETTEWAY,
Circuit Judge.

APPENDIX P.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

June Term, A. D. 1937, En Banc.

A. Y. OATES and His Wife, ALMENA OATES, *Appellants,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellee.*

Opinion filed December 22, 1937.

An appeal from the Circuit Court for Polk County, H. C. Petteway, Judge.

Ira C. Hopper, for Appellants.

Bradford G. Williams, Raymond D. Knight, Henry P. Adair, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellee.

ELLIS, *C. J.:*

The only question presented by this appeal is whether, in the circumstances established by the record, a married

woman, the owner by entireties with her husband of certain real property which constitutes the homestead of the husband, is estopped from contesting the validity of a mortgage which was placed upon the homestead by the husband to secure a loan to him upon the ground that she did not appear before the notary public separately and apart from her husband, or at all, and before such officer acknowledge separately from her husband that she executed the instrument freely and voluntarily and without any compulsion, constraint, apprehension or fear of or from her said husband.

The circumstances in which the mortgage involved in this case, and which is sought to be foreclosed by an assignee of the original mortgagee, was executed are as follows: on the First of June, 1926, Mr. and Mrs. A. Y. Oates were the owners by the entireties of a certain parcel of land with improvements thereon located in Casa Bella, a subdivision of Lakeland in the County of Polk in this State. Mr. Oates having obtained a promise of a loan from the mortgagee, Telfair Stockton & Company, prepared a mortgage to secure the payment of the note executed by him and his wife for the payment of the loan, which was in the sum of $15,000, and taking the mortgage to his home procured the signature thereto of his wife.

The signatures of Mr. and Mrs. Oates appear to have been made in the presence of two witnesses: A. F. Pickard and Leone C. McGowan. The latter named person is the notary public before whom the certificate of acknowledgment of the execution of the mortgage appears to have been made. Mrs. Oates, at the request of her husband, signed the mortgage at her home and did not appear in person before Leone C. McGowan, the notary public, who was an employee in the office of Mr. Pickard, which office was located elsewhere in the city of Lakeland.

Mrs. Oates had on many occasions before signed deeds or mortgages at the request of her husband without appearing before a notary public to acknowledge the execution of the instrument in accordance with the requirements of the statute. She did not know that the mortgage in question in this case described the homestead, nor does it appear that there was any conversation between her and

her husband relating to the subject matter of the transaction.

There is no evidence that Mrs. Oates acted under duress in signing the mortgage nor is there any evidence that Mr. Oates did not receive the money for which the mortgage was given. Mr. Oates took the mortgage and delivered it to the mortgagee, Telfair Stockton & Company, the mortgage appearing upon its face to have been duly executed and acknowledged.

Mr. Oates at the time of applying for the loan from Telfair Stockton & Company and at the time of the execution of the mortgage and delivery of the same, and afterwards, was the head of a family residing in this State and the property covered by the mortgage was, as stated, the homestead of Mr. Oates, although it was owned by himself and his wife by the entireties.

On the third of August, 1934, in a final decree, based upon the pleadings and the evidence in the case, the court definitely found the fact to be that Mrs. Oates did not acknowledge the execution of the mortgage before the notary public or any notary public, "therefore, that the said certificate was and is a legal fraud and a nullity, and therefore, this Court finds that the said mortgage was not and is not a properly and validly executed mortgage and is unenforceable, and cannot be foreclosed against the property" therein described.

It is also a fact that when Mrs. Oates signed the mortgage there was a blank unexecuted certificate of acknowledgment appended thereto immediately below and upon the same sheet; that it was this certificate which was subsequently executed by the notary public although Mrs. Oates did not appear before her and make the requisite acknowledgment of the execution of the mortgage; that the mortgage was filed for record in the office of the clerk of Polk County, and duly recorded. In June, 1926, the New York Life Insurance Company purchased the note and mortgage from the mortgagee at par value. Neither at the time of the delivery of the mortgage to Telfair Stockton & Company, or at the time of delivery by it to the New York Life Insurance Company was either party advised that there

was any defect whatsoever in the notarial certificate of execution of the mortgage by the wife, Mrs. Oates.

In June, 1930, the assignee of the Oates note and mortgage exhibited its second amended bill of complaint in the Circuit Court of Polk County against A. Y. Oates and his wife, Almena Oates, for the foreclosure of the mortgage alleging that the same was in default and unpaid and praying the usual relief.

In August, 1931, the Chancellor made a decree finding the equities with the complainant and decreeing a foreclosure of the mortgage. From that decree and from an order denying the defendants motion to vacate it, for leave to take further testimony and for a rehearing, the defendants Oates took an appeal.

The decree of the Chancellor was reversed on the authority of the cases of Menendez *v.* Rodriquez, 106 Fla. 214, 143 South. Rep. 223, and McEwen *v.* Schenck, 108 Fla. 119, 146 South. Rep. 839. See Oates *v.* New York Life Ins. Co. 113 Fla. 678, 152 South. Rep. 671.

The Menendez case, supra, was a suit for partition and involved an estate by the entireties. The Court held that where a homestead was held by a man and his wife by the entireties, upon the death of the husband the entire fee passed to the wife to the exclusion of the husband's children by a former marriage. Mr. Justice Whitfield, in a concurring opinion, elucidated fully that proposition of law.

In the McEwen case, *supra,* the defense interposed was that Mrs. McEwen did not appear before the notary public and did not make the acknowledgment as certified to by the notary public. The Chancellor, in his decree, stated that there was substantial evidence to support that defense but did not decide the weight and sufficiency of the evidence, and entered a decree for the complainant. The decree was reversed because the Chancellor failed to consider the weight and sufficiency of the evidence upon that averment of the plea. The court definitely held that where a married woman, in the attempted alienation of the homestead, appeared before the notary public and made the acknowledgment, that the certificate of the officer authorized to take such acknowledgment is, in the absence of fraud or duress in the matter of the acknowledgment by the married

woman, conclusive of the fact stated in the officer's certificate, but it was also definitely held that where the married woman did not appear before the officer who made the certificate of acknowledgment, then he was without "jurisdiction, authority or power to take the acknowledgment of the married woman, or to make the statutory certificate with reference thereto". In the concurring opinion by Mr. Chief Justice Davis, the thought was suggested that in such case fraud was shown on the part of the officer purporting to make the certificate, and therefore the presumed verity of the certificate was impeached.

The instant case, being reversed upon the first appeal, was considered by the Chancellor upon the pleadings and the evidence taken, and in August, 1934, he decreed the equities to be with the defendants, Oates, and dismissed the bill on the merits.

In that opinion the Chancellor found from the evidence in the case that Mrs. Oates did not appear before the notary public and therefore made no acknowledgment of the execution of the mortgage as the statute requires, and consequently the officer who made the certificate was without "jurisdiction, authority or power to take the acknowledgment" of Mrs. Oates. From that decree and an order entered later denying the plaintiff's petition for rehearing the complainant took an appeal.

By an evenly divided court, the decree was affirmed. A rehearing was granted and the following order was entered:

"Let judgment be entered on rehearing vacating and reversing the final decree without prejudice, and without costs to either side, with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition, after a full rehearing and reconsideration of all of the issues of law and fact in the light of the opinion of this Court hereinbefore approved by a majority of the Court as the applicable law of this case to be considered and applied to its disposition."

See New York Life Ins. Co. *v.* Oates, 122 Fla. 540, 166 South. Rep. 269.

It will be noticed from a reading of the opinions that there was no opinion by the Court in the case approved by a majority of the Court. On the contrary the Court was evenly divided so that there could have been no other order than that of an affirmance. See State ex rel. Hampton *v.* McClung, 47 Fla. 224, 37 South. Rep. 51.

On motion for additional directions subsequently filed in this Court the Court made the following order:

"No mandate has been given to the chancellor to decide the facts of this controversy in the Court below in any particular way. Our last decision in effect does nothing more than grant a rehearing before the chancellor of the whole controversy. While in deciding the case on such rehearing, the chancellor is bound to follow and apply the applicable rules of law as last set forth in the opinion of Mr. Chief Justice Whitfield, which was agreed to by a majority of the Supreme Court, the decision of this case itself still remains with the chancellor, insofar as the weight and legal effect of the evidence in the case may be concerned when it is again heard by him on the rehearing we have in effect ordered in the Court below.

"It is not within the province of the Supreme Court to give any additional directions to the chancellor in the case, other than such as have already been set forth in our previous opinions and in our mandate, therefore the motion for same is denied." New York Life Ins. Co. *v.* Oates, *supra.*

It will be observed from that order that the Court merely stated that the Chancellor "is bound to follow and apply the applicable rules of law as last set forth in the opinion of Mr. Chief Justice Whitfield, which was agreed to by a majority of the Supreme Court, the decision of this case itself still remains with the chancellor, insofar as the weight and legal effect of the evidence in the case may be concerned when it is again heard by him". See New York Life Ins. Co. *v.* Oates, *supra.*

The rules of law as set forth in the opinion of Mr. Chief Justice Whitfield in that case related only to the matter of an estoppel of a married woman from denying that she

acknowledged the execution of a mortgage or deed in the manner required by the statute; that is to say, from denying that she appeared before a notary public or other officer authorized to take the acknowledgment of deeds and made due acknowledgment of the execution thereof.

The report of that case does show that on a rehearing a majority of the Court approved the language of Mr. Chief Justice Whitfield in relation to the doctrine of an estoppel as the same was invoked against Mrs. Oates. What the learned Justice said was, in substance, as follows: that the decree should be reversed because the Chancellor did not consider the question of estoppel against Mrs. Oates which issue "was made and not adjudicated by the court, though such issue of estoppel was referred to in grounds of the petition for rehearing which the chancellor by order denied", and on the matter of estoppel he said that a married woman may be estopped by her conduct concerning the execution of acknowledgment of instruments affecting real estate in which she is interested, and that this suit does not relate to title but to the recovery of money loaned upon the faith of a mortgage instrument which appears on its face to be duly executed; that the complainant assignee was not at fault, and the defendants have received a loan which if paid or otherwise settled will satisfy the demand for repayment of the loan.

It is incorrect to say that the defendants received a loan because there is no evidence whatsoever in the record that Mrs. Oates participated in the reception of that loan or the benefits derived from it. Neither is there any evidence in the record that either by her conduct or by her words did she induce Telfair Stockton & Company to make the loan to her husband upon the faith of the security represented by the mortgage involved in this controversy, nor that she participated in any manner in the transaction by which the loan was secured. From the evidence, as disclosed by the record and which the Chancellor found to be true, she merely, at the request of her husband, signed the mortgage without knowing for what purpose it was executed or upon what property it purported to constitute a lien. She was not even aware, as the Chancellor found,

that the property described was the homestead, which was held by her and her husband by the entireties.

In the opinion on rehearing, in which Mr. Circuit Judge John B. Johnson sat in place of the writer, who was absent on account of illness, it was merely determined that the principles of law relating to an estoppel, as announced by Mr. Chief Justice Whitfield in his opinion, should be applied in the case, by the Chancellor in a reconsideration of all the questions of law and fact in light of his opinion. There was no instruction direct or implied in that opinion to the Chancellor to hold that in the light of the circumstances in that case he should find that there existed an estoppel against Mrs. Oates.

So the judgment of this Court was entered reversing the decree upon the appeal of the New York Life Insurance Company, with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition after a full rehearing. The Circuit Court, pursuant to that mandate, on the 15th of July, 1936, upon a consideration of the entire cause after a full rehearing, rendered its decree holding that the equities were with the complainant, and ordered a foreclosure of the mortgage and reversed jurisdiction to make such further orders as the court might deem sufficient in the premises.

In a preliminary statement to the decree entered, the Chancellor stated that in his opinion the effect of the first decree rendered by the trial court was to hold:

"That a mortgage on a homestead signed by the wife, where she did not appear before the notary public as shown in the certificate of acknowledgment appended to said mortgage, is utterly void and that such married woman could not be estopped from claiming the benefit of said failure to appear before the Notary Public and thereby defeat the mortgage. That opinion went even further and held such estoppel would not lie even where the mortgage was transferred to the third party, and I think this undoubtedly was the law as laid down in a long line of decisions by the Supreme Court of Florida up to and including the first opinion in this case.

"Therefore, said cause came back to this Court with the law in my judgment settled by said opinion and preceding opinions to the effect that estoppel would not lie against the married woman in this case and could not be made to lie. Accordingly, entertaining this view of the law, this court made a finding of facts and entered a decree for defendants, decreeing the mortgage in this case to be invalid."

It is further stated in the decree that the court had found the fact to be that the married woman, Mrs. Oates, did not appear before the notary public who made the certificate of acknowledgment, and did not acknowledge the execution of the mortgage according to the requirements of the law. It was also stated that the Chancellor had found the fact to be that Mr. Oates, after procuring the signature of his wife to the mortgage, carried it before a notary public and in the absence of Mrs. Oates caused the certificate of acknowledgment to be made out and signed by the notary public; thereupon he carried the mortgage to the mortgagee, Telfair Stockton & Company, and received therefor the sum of money evidenced by the promissory note, the payment of which the pretended mortgage purported to secure.

The court further stated that he had definitely concluded that on the facts, as presented by the record in the cause, Mrs. Oates was not estopped from denying that she appeared before the Notary Public, and therefore the court was of the opinion that no other decree, in view of the pleadings and the evidence in the case, was proper to be rendered than that the mortgage was invalid.

Further in the preliminary statement to the decree, the Chancellor said that he construed the opinion written by Mr. Chief Justice Whitfield to differ from the law as the Chancellor understood it to have theretofore been laid down by the Supreme Court of Florida in other cases and in this cause. The Chancellor further stated that he construed the opinion of Mr. Chief Justice Whitfield to mean:

"that in the case of a mortgage on the home place signed by the wife and husband where she does not in fact appear

before any Notary Public or make any acknowledgment of the execution thereof before any Notary Public, *but the husband takes the said mortgage so signed by his wife and has an acknowledgment apparently good on its face appended thereto, and takes same to the mortgagee therein named, and secures money for a loan on said property, that the wife under such facts is estopped from claiming that she did not appear before the Notary Public and that the mortgage is therefore invalid.*"

That interpretation of the opinion of Mr. Chief Justice Whitfield was erroneous. What was said was that where:

"in a suit to foreclose such a mortgage, it is admitted or duly proven that the mortgage was signed by both the husband and wife, but it is averred as a defense that the wife did not appear before or acknowledge the execution of the mortgage before the officer whose certificate states that she did so appear and acknowledge the execution of the mortgage, then, in the absence of estoppel, such averment as a defense may be proven by convincing evidence. Hutchinson *v.* Stone, 79 Fla. 157, 84 South 151; Randall *v.* Twitchell, 98 Fla. 559, 124 So. 21; Morris *v.* Shepard, 104 Fla. 121, 139 So. 189; Smith *v.* Hogan, 117 Fla. 82, 157 So. 183; Suttle *v.* Wold, 117 Fla. 802, 158 So. 447; Smith *v.* McEwen, decided at this term.

"Where it is admitted or duly proven that the wife did appear before the officer concerning the execution of the mortgage by her, she will be estopped to assert that she did not make the statutory acknowledgment of the execution of the mortgage as may be properly stated in the officer's certificate. But if it be clearly shown by convincing testimony of disinterested witnesses that there was fraud or duress in procuring the execution of the mortgage or in taking acknowledgment of the execution by the wife, in which fraud or duress the holders of the mortgage or their privies participated, or of which fraud or duress they had or could reasonably have had knowledge or notice, the mortgage holders will be estopped to enforce the mortgage. See Shear *v.* Robinson, 18 Fla. 379; Bank of Jennings *v.* Jennings, 71 Fla. 145, 71 So. 31; Smith *v.* Commercial Bank, 77 Fla. 163,

81 So. 154; Rausch *v.* Eqt. L. Assn. Soc., 77 Fla. 846, 82 So. 295; Green *v.* First Nat'l Bank, 85 Fla. 51, 95 So. 231; Herald *v.* Hardin, 95 Fla. 889, 116 So. 863; Morris *v.* Shepard, 104 Fla. 121, 139 So. 189." "In their answer the husband and wife admit that the wife signed the mortgage instrument; but the answer avers that the wife did not appear before the officer and did not acknowledge the instrument in the presence of the officer. On such averment it may be shown by positive, clear, convincing and legally sufficient evidence, as by sufficient competent testimony and corroborating circumstances, that the wife did not appear before the officer who certified that she did appeal before him and acknowledge the execution of the mortgage; and such showing may invalidate the mortgage, unless in estoppel it may be and is shown that by reason of the conduct of the wife in knowingly signing the mortgage instrument with the blank certificate of acknowledgment appended thereto and designed to be executed under the law, or by reason of other conduct of the wife concerning the transaction, her husband or his agent was enabled to have the appending certificate of the wife's acknowledgment that she executed the mortgage, authenticated by an officer, thereby making the mortgage valid on its face, upon the faith of which a loan was made."

"It is claimed that such conduct and its consequences are shown, for which the husband and wife should be estopped to assert as a defense to the suit that the wife did not appear before or acknowledge before the officer the execution of the mortgage by her. If such estoppel is adjudicated, the official certificate will stand to sustain the mortgage which on its face is duly executed and acknowledged as required by the constitution and laws of the State." New York Life Ins. Co. *v.* Oates, *supra.*"

It appears from the language that the thought in the mind of the learned Chief Justice writing the opinion was, first, whether the wife did appear before the notary public, the certificate of such officer being quasi judicial in character was prima facie evidence of the regularity of the acknowledgment; second, that a defense interposed to the foreclosure of such a mortgage that the wife did not in fact appear before the notary public, and such defense established by

clear and convincing evidence, it was a complete defense to the foreclosure proceedings in a case where the husband and wife held the property intended to be mortgaged by the entireties or that it constituted the homestead; third, that such defense however could be overcome in a case where the wife by her conduct either in word or deed showed that it was her purpose to authorize the certificate of the notary public to be filled out in her absence, to the end that the loan might be procured, or that she was aware that the blank certificate of acknowledgment was intended thereafter to be filled out in her absence, or by reason of other conduct of the wife concerning the transaction her husband or his agent was enabled to have the appended certificate of the wife's acknowledgment that she executed the mortgage authenticated by an officer, thereby making the mortgage valid on its face upon the faith of which a loan was made.

The Chief Justice also stated that if such estoppel were shown the official certificate would stand to sustain the mortgage.

The Court in that opinion expressly stated that it did not determine whether the evidence justified the findings of the Chancellor that the wife did not appear before the officer and did not acknowledge before any officer that she executed the mortgage, but the decree should be reversed because the question of estoppel, as against the wife as described in the opinion, was presented and not adjudicated.

The evidence fully sustains the finding of the Chancellor that the wife did not appear before the notary public making the certificate of acknowledgment; second, the defense that she did not appear before the notary public and did not make an acknowledgment of the execution of the mortgage, and that the property was held by her and her husband by the entireties and constituted their homestead, was established in the opinion of the Chancellor by clear and convincing evidence; third, there is no evidence in this record that the elements of an estoppel, which would operate against Mrs. Oates from denying that she appeared before the notary public and acknowledged the instrument as the law requires, existed, and the Chancellor in his opinion seems to so find the fact to be, because the whole tenor of his opinion, gathered from the words of it, is that he re-

garded the opinion of Mr. Chief Justice Whitfield to be an instruction to the Chancellor to find that such an estoppel existed against Mrs. Oates.

We reaffirm the view, as expressed by the Chancellor in all of his opinions in this case, that it is essential to the validity of a mortgage upon real estate held by the husband and wife by the entireties or upon the homestead that the wife shall appear separately and apart from her husband before the notary public and acknowledge before such officer that she executed the instrument freely, voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and that the certificate of the notary public that the wife did so appear could be overcome by convincing evidence, which was done in this case.

The citations made by the Court in the opinions rendered in this cause heretofore upon this point need not be here repeated.

Upon an examination of the record and evidence in this cause, we find that there is a total lack of any authority for the assertion that Mrs. Oates, by her words or her conduct, authorized her husband or his agent to procure the making of a certificate of acknowledgment by her as the statute requires, nor is there any evidence that she participated in the transaction by which the loan was obtained, or that by any word or act of hers did she induce the mortgagee to believe that it was her purpose to acknowledge before a notary public, as the law requires, the execution of the instrument. On the other hand the evidence is abundant to sustain the finding that without any knowledge of the property which was being encumbered, save what was contained in the instrument itself, of which she may be held to have notice, and without any knowledge of the details of the transaction between her husband and Telfair Stockton & Company further than that he intended to obtain a loan from it, she signed the note and the mortgage at his request and deemed her duty to have ended with her signature to the mortgage.

There is not in the record any evidence which suggests that by her words or her conduct she induced the making of the loan, or that she personally participated in it further

than to comply with her husband's request to sign the instrument, which she did without question.

On the other hand some duty rests upon the other parties to such a transaction, at least prudence requires of them, in the matter of making a loan upon real estate which is held by the entireties by husband and wife, and has the additional peculiarities which the character of a homestead casts upon it, to satisfy themselves that the requirements of the law have been complied with in the formal execution of the mortgage. This the mortgagee failed to do, but saw fit to rely upon the face of the instrument as to its regularity and the prima facie quality of verity of the notary's certificate notwithstanding the law charges it with a knowledge that it is essential to the validity of such certificate that the wife shall personally appear before the officer and make the acknowledgment which the law requires.

A mortgage does not possess the negotiable character of a promissory note and neither the payee, mortgagee or assignee of such mortgage may accept the same as a courier without luggage.

The knowledge that Mrs. Oates did not in this case appear before a notary public was open to the mortgagee by the slightest effort on its part by having a representative present when the certificate was made, or questioning the husband or wife as to whether the latter appeared before the notary public.

Concerning the question of the morality of righteousness of the defense interposed in this case by the Oateses, the Court, of course, should not and does not express any opinion.

Article XI, Section 1, of the Constitution of Florida, expressly provides that the separate property of a married woman, real or personal, shall not be subject to the payment of her husband's debts without her consent given by some instrument in writing according to the law respecting conveyances by married women.

Article X, Section 1, of the Constitution, provides that the homestead shall not be alienable without the joint consent of husband and wife, when that relation exists, and Section 4 of the same Article provides that the alienation

of the homestead may be made by husband and wife, when that relation exists.

It has been held by this Court that the married man may alienate his homestead by deed or mortgage executed by himself and wife. Norton *v.* Baya, 88 Fla. 1, 102 South. Rep. 31; McEwen *v.* Shenck, *supra*; Hams *v.* Marshall, 43 F. (2d) 703.

This Court in the case of Hutchinson *v.* Stone, 79 Fla. 157, 84 South. Rep. 151, said: "A 'mortgage duly executed' by husband and wife' sufficient to create a lien upon homestead real estate of the husband, as between the mortgagors and mortgagees must be duly executed by the husband and wife and the execution by the wife duly acknowledged by her, since under the statute due acknowledgment by the wife of the execution of the deed or mortgage by her is essential to the validity of any conveyance or relinquishment of an interest in real estate by the wife even as between the parties to the instrument." text page: 79 Fla. 166. See also Murphy *v.* Duncan, 111 Fla. 548, 149 South. Rep. 594.

Section 5676 C. G. L. 1927 prescribes the method at law by which a married woman may effectually pass her estate or right in real property to a third person, and that method requires her to acknowledge before some officer authorized to take acknowledgments of deeds, separate and apart from her husband, that she executed the same freely and voluntarily and without complusion, constraint, apprehension or fear of or from her husband, and the officers certificate shall set forth all the foregoing requirements.

It was held in the case of Thompson *v.* Kyle, 39 Fla. 582, 23 South. Rep. 12, that a mortgage properly executed by husband and wife conveying the wife's separate statutory real property as security for the husband's debts is valid in this State.

Thus it appears that the law of this State requires the formalities set forth herein to be observed in order that a married woman may alienate her separate estate by either deed or mortgage or that the homestead may be alienated in such manner.

It is not within the province of this Court to question the wisdom of such constitutional and statutory requirements,

but on the other hand it is the duty of the Court to determine the question of the validity of an alienation of the homestead or the separate statutory property of the wife by the provisions existing in the law, both constitutional and statutory, that exist. It is not within the province of the Court to bring to the aid of the mortgagee or grantee in a deed, in his effort to enforce the same in the courts, the negligent failure of the grantee or mortgagee to pursue the prudent course of ascertaining for himself that the requirements of the law have been followed and observed which are necessary to the alienation of the homestead or the separate statutory property of the married woman. However much the exigencies of the situation, due to a large volume of business, may be used by way of an apologetic explanation of why the prudent course was not followed, it cannot be used to the extent of establishing an estoppel against a married woman from denying the validity of the certificate. Such estoppel can exist, if at all, by a clear, affirmative showing that the married woman by such words or conduct placed herself in the inequitable position of inducing or consenting to the loan, or impliedly authorized her husband to cause the certificate of acknowledgment to be executed and then availed herself of the defense that she did not legally execute the instrument.

Such circumstances did not exist in this case and the record does not disclose any foundation for invoking the doctrine of estoppel against the defendants. The decree of the chancellor is reversed with directions to adjudicate the question of estoppel as the same is invoked against Mrs. Oates and in so doing to determine whether the evidence discloses in this case that by her words or deed she authorized her husband to cause the certificate of acknowledgment to be made out in her absence to the end that a loan, as set forth in the instrument, might be procured from the mortgagee.

Reversed.

Whitfield, Terrell, Brown, Buford and Chapman, *J. J.*, concur.

APPENDIX Q.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1937.

Wednesday, December 22, 1937.

A. Y. Oates and His Wife, Almena Oates, *Appellants,*
vs.
New York Life Insurance Company, a Corporation, Appellee.

An Appeal from the Circuit Court for Polk County.

This cause having heretofore been submitted to the Court upon the transcript of the record of the decree herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is error in the said decree; it is, therefore, considered, ordered and decreed by the Court that the said decree of the Circuit Court be and the same is hereby reversed; it is further ordered by the Court that the Appellants do have and recover of and from the Appellee their costs by them in this behalf expended, which costs are taxed in the sum of $—, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Ellis was this day ordered to be filed.

APPENDIX R.

IN THE SUPREME COURT OF FLORIDA,
POLK COUNTY.

January Term, A. D. 1938

Tuesday, February 15, 1938.

A. Y. Oates and His Wife, Almena Oates, *Appellants,*
vs.
New York Life Insurance Company, a Corporation, *Appellee.*

Counsel for Appellee having filed a Petition for Rehearing in this cause and having also filed an application for

Oral Argument on the Petition for Rehearing, which have been duly considered, it is ordered and adjudged by the Court that the said Petition for Rehearing and the said application for Oral Argument be and they are hereby denied.

APPENDIX S.

(Caption omitted)

Order Denying Motion for Leave to Take Further Testimony and for Order Fixing Time within Which Same May Be Taken, and for Order Appointing an Examiner.

The above and foregoing cause came on for hearing upon motion of the Complainant for lieve to take further testimony and for order fixing the time within which same may be taken, and for order appointing an examiner. The defendants objected to the granting of said motion on the grounds that it was not seasonably made and that it does not excuse the delay in filing same; that it is too late to file such a motion and that said motion does not comply with the rules and requirements for granting an order to take further testimony and that the testimony suggested as being possible to offer has either been introduced or is irrelevant or immaterial to the issue involved. Thereupon the motion was argued by the solicitors for the respective parties.

It appears that the bill of complaint in this cause was filed on the 20th day of March 1930, *some eight years and three months prior to this time* and that on the 5th day of April 1930, more than eight years prior to this date, complainant filed an amended bill of complaint and that on the 18th day of June, 1930, nearly eight years prior to this date, complainant filed a second amended bill of complaint and that thereafter on the 5th day of January, 1931, the defendants filed an answer to the second amended bill of complaint and that on the 9th day of February, 1931 an order of reference was made, referring said cause to a Special Master to take the testimony and that after various extensions of time for the taking of testimony, the report of the Special Master was filed on July 2, 1931, *nearly five months* after

the appointment of the Special Master. It is clear, therefore, that the parties originally had approximately five months in which to take the testimony in this cause.

Thereafter the said cause came on for final hearing before one of the Judges of the Circuit Court in and for Polk County, Florida, and upon motions of the Complainant to strike from the evidence all the testimony of the defendants, A. Y. Oates and Almena Oates and all testimony attempting to show that the defendant, Almena Oates did not appear before the Notary Public or acknowledge the execution of the mortgage, the Court granted the motion and entered an order sustaining complainant's objections and *striking such testimony of defendants' witnessed, on the 26th day of August, 1931.*

Thereafter, on the 17th day of September, 1931, and *within due season under the rules,* the defendants filed a motion to vacate the final decree and to take further testimony and for a rehearing of said cause and the Court denied said motion on the 17th day of September, 1931. Thereupon an appeal was taken to the Supreme Court of Florida by the defendants and the Supreme Court reversed said final decree and held that *said testimony so stricken should not have been stricken, but should have been considered by the chancellor and that the additional testimony sought to be offered in connection with the petition for rehearing was material and that the application was seasonably made and that the chancellor should give the defendants an opportunity to introduce the proposed testimony for consideration.*

Thereupon the cause came back to the Circuit Court of Polk County, Florida, with directions to the Circuit Court to consider the testimony which had been previously stricken by the Circuit Court and to allow the introduction of the additional testimony offered by the defendants and thereupon complainant applied to the Court for lieve to take additional testimony, *and since the defendants were permitted to put in certain additional testimony under order of the Supreme Court, and since the Circuit Court was going to be required to consider evidence as material that the Circuit Court had previously excluded, and since the complain-*

ant would be entitled to rebuttal evidence of the new evidence to be offered, it appeared to the Court that it would be proper and fair to all parties to grant the application of complainant and throw the case wide open for the purpose of taking any additional evidence that the complainant and the defendants might care to offer, and thereupon the Circuit Court, *on the 12th day of May, 1934, more than four years prior to this date,* entered an order referring this cause to a Special Master with provisions for *presentation by either party of whatever testimony they might have to offer,* and the complainant offered testimony for the purpose of attempting to refute the testimony of the defendants concerning the failure of the defendant, Almena Oates, to appear before the Notary and acknowledge the execution of the mortgage and the *Special Master's report of such additional testimony was filed on the 11th day of July, 1934, nearly four years ago,* and thereafter, to-wit, on July 30, 1934, a deposition of a witness, to-wit; Frances M. Holt, was introduced by complainant in attempting to refute the evidence of the defendants.

Thereafter on August 7, 1934, a final decree was entered by the Judge of the Circuit Court in and for Polk County, Florida, wherein and whereby *it was found and decreed that the defendant, Almena Oates, who was the wife of the defendant, A. Y. Oates, had proven the allegation in her answer that she did not acknowledge the execution of the mortgage and that she did not appear in any manner before the Notary Public who signed the certificate of acknowledgment* and, having so found and decreed the facts to be as aforesaid, this Court entered a decree holding said mortgage invalid and canceling same.

Thereupon the complainant appealed said cause to the Supreme Court of Florida and the Supreme Court of Florida announced a decision by a divided Court, affirming the decree of the Circuit Court. Opinions were written by several of the Justices, *and the correctness of the finding and decree of the chancellor as to the fact of the defendant, Almena Oates, not appearing before the Notary Public to acknowledge the execution of the instrument, was not questioned.*

Thereafter a petition for rehearing was filed and with one Circuit Judge sitting as a member of the Court, the Supreme Court granted the petition and reconsidered the cause and decided to reverse same. *Again no question of the correctness of the chancellor's findings as to facts were raised by the Supreme Court.*

It appears that the majority of the Supreme Court in this last opinion came to the conclusion *that the Court did not consider the question of estoppel under the facts and sent the case back to this Court to consider same and to decide same under the law as laid down in the opinion of Mr. Justice Whitfield.*

Thereupon the cause came back to this Court, and this Court, construing the opinion of Mr. Justice Whitfield to be that under the facts as already found and decreed by this Court, the defendant, Almena Oates, would be estopped from claiming the mortgage to be invalid because of her non-appearance before the Notary Public and not acknowledging the execution of the mortgage, this Court entered a final decree holding said mortgage valid and foreclosing same, and the said cause was thereafter appealed again to the Supreme Court of Florida by the defendants, and thereafter the Supreme Court of Florida again reversed the decree of the Circuit Court and *again raised no question of the chancellor's finding and decree as to the facts* and setting out what the law was with reference to such facts as had been found by the chancellor, sending it back to the Circuit Court for the Circuit Court to consider the case and decide same in conformity with the law as laid down in this last opinion by Mr. Justice Ellis.

Now, upon this cause coming back, complainant comes in again *more than eight years after the filing of the bill of complaint in this cause, and about four years after the taking of testimony in this cause was thrown wide open at the request of the complainant* for the taking of whatever other evidence that the complainant and the defendant might have or procure to offer and *after the facts in this case have been established and found by the chancellor and been to the Supreme Court twice and remained unquestioned,* and asks this Court in substance to throw the case wide open

again for the further taking of such testimony as complainant might wish to, or be able to introduce.

I believe in being reasonably lenient generally in the question of permitting the introduction of all evidence and the filing of all pleadings that may be necessary to present the rights of the parties before the Court in the best possible light, *but there must be some end to litigation and there must be some rules to govern litigation so as to end same at some time,* and this Court is of the opinion that this case now comes within the class of those cases which should have an end at some time. It seems to the Court that all parties have had every possible opportunity *over a period of many years, to find and introduce all material evidence and that to come in at this late date, about seven years after the completion of the taking of the testimony the first time and four years after the chancellor threw the case wide open for taking all additional testimony either party might have to offer,* and after the case has been to the Supreme Court twice subsequent to the last taking of testimony and the law laid down and established by the Supreme Court in connection with the findings of fact by the chancellor, is asking the chancellor to make an unreasonable exercise of such discretion that the chancellor might have, if any, to grant such motion. Such application, therefore, seems to this Court not to be seasonably made, nor does there appear from the said motion and affidavit accompanying same, any reasonable excuse for not having seasonably made such motion or offered such testimony or justification for the Court reopening this cause and admitting same.

The special affidavit accompanying the motion covers only matters purporting to go back into the old question of subrogation already heretofore settled in this cause by the original decree of Judge Taylor, which has never been questioned up to this time, and the only question left for adjudication so far as I can see is the question of whether Mrs. Oates is estopped on setting up defense of invalidity of the mortgage. In addition, the witness offered was of counsel for the defendants.

The motion itself, in the second paragraph thereof, will add nothing to the evidence already in the record, because the Supreme Court held in the original first appeal that the

fact that the complainant was a bona fide purchaser of the mortgage without notice did not protect them against the estoppel defense of Mrs. Oates. The whole question is, therefore, not whether complainant was an innocent purchaser of the mortgage for value, but whether or not Mrs. Oates' actions and conduct has been such as to estop her from setting up the defense of invalidity of the mortgage. It has already been adjudicated that the original mortgagee actually paid over the money to Mr. Oates for the mortgage and it has not been established by the evidence that the mortgagee or the complainant had any knowledge of the invalidity of the mortgage because of no acknowledgment by the defendant, Almena Oates. In addition to that the witness whose testimony is proposed has been available and of counsel for the complainant since the institution of this suit.

The third paragraph of said motion suggests some problematical possibilities of proof about the defendant, Mrs. Oates, being present at a bankruptcy hearing in which it was recited in the petition of the defendant, A. Y. Oates, that the mortgage involved in this cause was a valid mortgage and that the defendant, Almena Oates, knew or should have known, of the existence of the mortgage. I cannot see where this would add anything material in the determination of the question of estoppel on the part of the defendant, Almena Oates. The mortgage was either valid or invalid and estoppel will lie, or not lie, because of the facts and circumstances *surrounding the original execution and delivery of the mortgage and the payment by the mortgagee of the money therefor.* In addition to that, all these bankruptcy proceedings have been available for all these many years and they were material and in fact part of them have been introduced into the records of this cause heretofore. There is a suggestion also in said paragraph three that the complainant might find other matters in said bankruptcy proceedings pertinent to the issues. In the first place, this is too general, and in the second place, subject to the same objection as to previous availability.

In paragraph four of said motion it is suggested that the complainant could offer the testimony of one E. B. LeMasters, who was an employee in the office of the original mort-

gagee. No sufficient excuse is offered for the complainant not having heretofore examined and contacted this witness. The witness was out of the state but could have been contacted in the 7 or 8 year period, so far as the record shows, and was contacted by the writing of a letter by complainant's attorney in May, 1938. The complainant is not even positive as to what such witness would testify, if produced as a witness.

Paragraph five of the said motion merely expresses a hope that with more time to investigate, complainant might find some other evidence, which, of course, is no basis for reopening the case for the taking of further testimony, especially in a case in which the testimony has been finished as long as it has been in this case.

Wherefore this Court is compelled to arrive at the conclusion that the motion and accompanying affidavit would not warrant or justify this Court in opening up this case at this time and permitting the taking of further testimony.

Wherefore it is hereby Ordered, Adjudged and Decreed that the motion of the complainant for lieve to take further testimony and for order fixing the time within which same may be taken and for order appointing an examiner be, and the same is, hereby denied.

Done and Ordered at chambers in Lakeland, Polk County, Florida, this the 6th day of June, A. D. 1938.

H. C. PETTEWAY,
Judge of the Circuit Court.

APPENDIX T.

Final Decree.

The above and foregoing cause came on for final hearing upon the record and the evidence in this cause. The same was thereupon argued by counsel for the respective parties and the Court has carefully considered same.

This cause has been argued and decided so many different times and with so many different results that this Chancellor is frank to confess that his humble mind may

not be sufficient to understand all the various decisions that have been rendered herein. However, since this cause has again been sent back to this Chancellor to decide, it is necessary for this Chancellor so to do.

This cause was decided originally by Judge Taylor, one of the then Circuit Judges in Polk County, Florida, and Judge Taylor decided that in this particular case evidence of whether or not Mrs. Oates appeared before the notary public was immaterial, because the complainant was an innocent purchaser for value without knowledge of any such irregularity. The Supreme Court reversed the decision of Judge Taylor and it seemed to me then and it seems to me now that they held that the matter of complainant being an innocent purchaser for value without any knowledge of any irregularity did not preclude Mrs. Oates from setting up the defense that she did not appear before the notary public, anything said in the old McClure case to the contrary notwithstanding. It seems to me that the Supreme Court of Florida at least had to settle this

point in order to reverse the case at all. This Chancellor construed the opinion to settle the whole law of the case on estoppel in general and thereafter was of the opinion that in the light of the law as laid down by the Supreme Court in the first appeal in this case, Mrs. Oates was not estopped from setting up her defense of not appearing before the Notary Public. While this Court did not say in specific words that this Court found that Mrs. Oates was not estopped under the law and the evidence, this Chancellor thought he was settling that question by holding that under the law, as he construed it, and as settled by the Supreme Court of Florida as applied to the facts found and stated in the decree by this Chancellor, that estoppel would not lie against Mrs. Oates' defense.

Thereafter, the complainant appealed this cause to the Supreme Court of Florida and the Supreme Court of Florida divided—three Justices for affirmance and three Justices for reversal, with those Justices favoring affirmance taking the same view apparently that this Chancel-

lor took, or thought he was taking in rendering such decree. The views of the three Justices who were of the opinion the cause should be reversed seemed to have been expressed in the opinion of Mr. Justice Whitfield, who was of the opinion that the cause should be reversed for the lower court to pass directly on the question of estoppel in accordance with the principles of law as laid down in his opinion.

Thereafter, it seems a petition for re-hearing was filed, and Mr. Justice Ellis was sick and a Circuit Judge was called in to act in the place of Mr. Justice Ellis on the re-hearing, and the Circuit Judge apparently agreed with the views of Mr. Justice Whitfield and, since Mr. Justice Ellis was one of the three judges who had voted to affirm the decree, a new decision was rendered by the Supreme Court by a 4-2 decision, reversing the cause and sending it back to this Court for further adjudication.

Thereafter, all of the Justices, including Mr. Justice Ellis, concurred in a supplementary opinion or statement

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on an extraordinary petition for re-hearing that in sending the cause back to the chancellor for further adjudication the chancellor was not directed what decision to make, but was directed to adjudicate the cause in conformity with the opinion of Mr. Justice Whitfield, and so said cause came again for final hearing before this Court.

Perhaps this Court did not make its views clear in the second decision by this Court, and there seems to be an impression that this Court entered the decree upon the second decision because this Court felt that it was ordered to enter a decree in favor of complainant by the opinion of the Supreme Court. However, as stated in said final decree, this Court did not so decide said cause for said reason. For all practical purposes it may have been the same thing, but this Court's reasoning was entirely different. This Chancellor held that in his opinion this chancellor was free to enter any decision on the question of estoppel that this chancellor saw fit, provided it was in conformity with the opinion of Mr. Justice Whitfield, and

this chancellor then recited that the facts in this case had theretofore previously been determined by this Court and the correctness of such facts had not been in any wise questioned by the Supreme Court in its decision, and that no change had been made in the said facts or evidence and that, therefore, the facts were still the same as they were when they were found and established by this Court in the final decree which had been reversed, and thereupon this Court was of the opinion, and so recited, that this Court construed the opinion of Mr. Justice Whitfield to say that where certain facts existed then the wife, who in this case is Mrs. Oates, would be estopped, and set out what this Court considered the facts were that would constitute estoppel under the opinion of Mr. Justice Whitfield, and this Court further was of the opinion, and recited therein, that those facts were identically the facts which had already been found and established by this Court to be the facts in this case, and that, therefore, in view of these considerations this Court felt that there was nothing for this Court to do except to determine that Mrs. Oates was estopped under the facts in this cause from maintaining her defense

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as to not appearing before a Notary Public, and consequently for that reason this Court considered the decision of the Supreme Court in ordering this Court to decide the case in accordance with the opinion of Mr. Justice Whitfield to be equivalent to ordering this Court to decide that Mrs. Oates was estopped.

Thereafter, the defendants appealed this cause to the Supreme Court of Florida. The same came on for consideration again with the full Court, including Mr. Justice Ellis, taking part in the decision, and this time the Supreme Court again reversed the decision of this Court for the reasons set out in the opinion of Mr. Justice Ellis, in which opinion *all* of the Justices concurred, and the cause was remanded to this Court "with direction to adjudicate the question of estoppel as the same is invoked against Mrs. Oates, and in so doing to determine whether the evidence discloses in this case that by her words or deeds she au-

thorized her husband to cause the certificate of acknowledgment to be made out in her absence to the end that a loan as set forth in the instrument might be procured from the mortgagee", and so this cause comes back to this Chancellor again for a final determination.

I am frank to say that I could not feel or believe that in sending this cause back to this Court, on the reversal of the first final decree entered by this chancellor, the Supreme Court merely wanted this chancellor to use the language or words that this chancellor examined the records and found no estoppel, without reference to the law as laid down by the opinion of the Supreme Court relative to the facts in this case, and it must be remembered that in such final decree this Court had finally found and established the facts in this cause and that the record would not warrant any other finding; and those facts, as so found and established were before the Supreme Court when it rendered its opinion reversing the decree in favor of the defendants and ordering this chancellor to decide said cause in accordance with the opinion of Mr. Justice Whitfield. There were not then and there are not now any other find-

ings of fact that could be made under the record, and these facts were before the Supreme Court at the time that decision was entered, and some of the opinions of the Judges referred to the fact that the findings had been made and that there was no question as to the correctness of the findings. Therefore, when this cause was then reversed and sent back for this chancellor to decide same in accordance with the opinion of Mr. Justice Whitfield, there were no facts except those which were before the Supreme Court at the time Mr. Justice Whitfield wrote his opinion and all the Justices ordered this Court to decide the case in accordance therewith. Consequently it seemed to this Court that it would be impertinent for this Court to attempt to decide said cause on the question of whether or not there was any estoppel, because all of the facts and findings had been before the Supreme Court when the Supreme Court reversed the cause. It seemed to this Chancellor that

where there was an established state of facts and a decree based thereon, with no other facts to be considered, and that a decree had been reversed, that this Court would be impertinent in attempting to say that, in spite of that reversal, those same facts which the Supreme Court had before it when it reversed the decision of this Court would warrant the entering of another decree on the same basis by this Court reaching the same conclusion that it had previously reached, which conclusion had been reversed.

However, it must be that the Supreme Court on last appeal considered that Mr. Justice Whitfield did not set down any particular state of facts which would as a matter of law, if found to exist, constitute estoppel against Mrs. Oates, or that if he did, then the facts as laid down by him in discussing the principles of law to be applied were not the facts as the record showed them to exist in this case. I take it this must be the conclusion the Court reached in its last decision and opinion because Mr. Justice Ellis, in his opinion says:

"The interpretation of the opinion of Mr. Justice Whitfield was erroneous"

and Mr. Justice Ellis further says that the effect of the

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opinion of Mr. Justice Whitfield and the decision of the Court was:

"That the decree should be reversed because the question of estoppel as against the wife as described in the opinion was presented and not adjudicated".

Mr. Justice Whitfield, who wrote the opinion which this chancellor was trying to follow in the last decision before this one, *concurs in the opinion of Mr. Justice Ellis in this case.* Taking these statements, therefore, to be correct, and they are the last opinion on the subject by Mr. Justice Ellis and concurred in by Mr. Justice Whitfield and all the other Justices, there was evidently no intention in the opinion of Mr. Justice Whitfield to apply his opinion to the facts

of this case as had theretofore been found and established by this Court.

However correct this conclusion as to Justice Whitfield's opinion may be, it would be impossible to say the same thing with reference to the later opinion of Mr. Justice Ellis, concurred in by Mr. Justice Whitfield and all the other Justices in reversing the last decree of this Court and sending this cause back to this Court for adjudication, because Mr. Justice Ellis, in his later opinion in this case, sets out in detail the findings of this chancellor and the material evidence in reference thereto, and then says:

"The evidence fully sustains the findings of the chancellor that the wife did not appear before the notary public making the certificate of acknowledgment; second, the defense that she did not appear before the notary public and did not make an acknowledgment of the execution of the mortgage, and that the property was held by her and her husband by the entireties and constituted their homestead * * *; third, there is no evidence in this record that the elements of an estoppel, which would operate against Mrs. Oates from denying that she appeared before the notary public and acknowledged the instrument as the law requires, existed."

Thereafter, Mr. Justice Ellis says:

"Upon an examination of the record and evidence in this cause, we find that there is a total lack of any authority for the assertion that Mrs. Oates, by her words or her conduct, authorized her husband or his agent to procure the making of a certificate of acknowledgment by her as the statute

requires, nor is there any evidence that she participated in the transaction by which the loan was obtained, or that by any word or act of hers did she induce the mortgagee to believe that it was her purpose to acknowledge before a notary public, as the law requires, the execution of the instrument. On the other hand the evidence is abundant to sustain the finding that without any knowledge of the description of the property which was being encumbered, save

what was contained in the instrument itself, which she may be held to have notice, and without any knowledge of the details of the transaction between her husband and Telfair Stockton and Company further then that he intended to obtain a loan from it, she signed the note and the mortgage at his request and deemed her duty to have ended with her signature to the mortgage. There is not in the record any evidence which suggests that by her words or her conduct she induced the making of the loan, or that she personally participated in it further than to comply with her husband's request to sign the instrument, which she did without question".

Thereafter, and just previous to that part of the opinion issuing direction to this chancellor to again adjudicate this case, Mr. Justice Ellis says:

"Such circumstances did not exist in this case and the record does not disclose any foundation for invoking the doctrine of estoppel against the defendants".

In the foregoing opinion Mr. Justice Whitfield and all of the Justices concur. Consequently this Court must take it that *the opinion of Mr. Justice Ellis,* with reference to the facts as found and existing in this case, and the law as applicable thereto, *is the opinion of the Supreme Court of Florida in its entirety.* It is not stated that any of the Justices concur merely in the conclusion reached or in the reversal.

So the case comes back to this chancellor for final determination, with the evidence exactly the same as the evidence was in the record before the Supreme Court when Mr. Justice Whitfield wrote his opinion in the next to the last reversal and when Mr. Justice Ellis wrote his opinion in the last reversal, and the case comes back to this Court for final determination in accordance with an opinion which sets out the evidence in this cause and finally says with reference to such evidence and the circumstances appearing therein:

"That the evidence sustains the finding of the Chancellor as stated in said final decree and that the record would not

justify any other finding".

and then sets out what the Court construes to be the *circumstances* under which, or facts of which, estoppel would lie against Mrs. Oates under the opinion of Mr. Justice Whitfield, and then says, with reference to such *circumstances* as are necessary to make out a case of estoppel against Mrs. Oates, as follows:

"Such circumstances did not exist in this case and the record does not disclose any foundation for invoking the doctrine of estoppel against the defendant".

Thus it is apparent that the Supreme Court last held that the evidence in this case *does not disclose any foundation for invoking the doctrine of estoppel against the defendant, Almena Oates.* I do not see, in the face of that, anything left for this chancellor to decide, unless this chancellor should have the temerity to disagree with the said opinion of Mr. Justice Ellis and concurred in by all of the Justices. For this Court now to turn around and perform the function of considering the evidence in this case and say that the same was sufficient for invoking the doctrine of estoppel against the defendant, Almena Oates, would be a direct attempt by this Court to repudiate the holding of the Supreme Court that no foundation for invoking this doctrine is disclosed in the record. I cannot see why the Supreme Court, having settled the law in the case with respect to the particular facts in the case, should not have ordered this Court to enter a decree that the Supreme Court thought was warranted.

The record in this case does not warrant the chancellor changing his findings of fact, and this chancellor does not feel that he could make any findings of fact in this case other than those already made and set out in the previous decrees herein entered in this cause by this chancellor, but even if this chancellor felt that this chancellor was warranted in changing his findings and find differently on the same evidence than this chancellor has heretofore several times found, this Court would be precluded by the opinion

of the Supreme Court, as announced by Mr. Justice Ellis, from so doing because that opinion says:

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"The record does not disclose any foundation for invoking the doctrine of estoppel against the defendants".

In the first decision this chancellor made of this cause, it was the finding and purpose and intent of this chancellor to find what the facts in this cause were, and this chancellor so found and stated said facts, and then to determine that under the law of Florida, and the law of this case, no estoppel would lie against the defense of Mrs. Oates under the evidence as so found to exist.

In the second decision of this cause by this chancellor, this Court found the facts to be identically as this Court had found them to be in the previous hearing, and there was no change in the evidence, but determined that estoppel would lie against Mrs. Oates because this Court considered the facts established, and therein set forth, to be identical with the facts and circumstances set out in the opinion of Mr. Justice Whitfield, and construed by this Court to be equivalent under that decision to constitute estoppel against a married woman contesting the validity of a mortgage because she did not appear before the Notary Public and acknowledge same.

Now *on the present decision in this case,* it is the intention of this Chancellor to find and to hold what this Chancellor thought he was holding in his *first decision in this cause,* to-wit: That certain facts exist in this case and that they are identically the facts which this Chancellor has heretofore found in his other decisions in this cause, and that under those facts the defendant, Almena Oates, is *not* estopped from setting up the defense which she has set up in this cause, and that therefore the mortgage sought to be foreclosed in this cause is void and of no effect and cannot be foreclosed or enforced.

Wherefor, this Court finds that on the first day of June, 1926, Mr. and Mrs. A. Y. Oates were the owners by the entireties of a certain parcel of land, with improvements thereon, located in Casa Bella, a subdivision of Lakeland

in the County of Polk in this State. Mr. Oates having obtained the promise of a loan from the Mortgagee, Telfair Stockton & Company, had prepared a mortgage to secure the payment of a note executed by him and his wife for the payment of the loan, which was in the sum of $15,000.00, and took the mortgage to his wife and procured the signature thereto of his wife.

The signature of Mr. and Mrs. Oates appear to have been made in the presnce of two witnesses; A. F. Pickard and Leone C. McGowan. The latter named person is the notary public before whom the certificate of acknowledge of the excution of the mortgage appears to have been made. Mrs. Oates, at the request of her husband, signed the mortgage at her home and did not appear in person before Leone C. McGowan, the notary public, who was an employee in the office of Mr. Pickard, which office was located elsewhere in the City of Lakeland.

Mrs. Oates had on many occasions before signed deeds or mortgages at the request of her husband without appearing before a notary public to acknowledge the execution of the instruments in accordance with the requirements of the statute. She did not know that the mortgage in question in this case described the homestead, nor does it appear that there was any conversation between her and her husband relating to the subject matter of the transaction.

There is no evidence that Mrs. Oates acted under duress in signing the mortgage, nor is there any evidence that Mr. Oates did not receive the money for which the mortgage was given. Mr. Oates took the mortgage and delivered it to the mortgagee, Telfair Stockton & Company, the mortgage appearing upon its face to have been duly executed and acknowledged.

Mr. Oates at the time of applying for the loan from Telfair Stockton & Company, and at the time of the execution of the mortgage and delivery of the same, and afterwards, was the head of a family residing in this state, and the property covered by the mortgage was, as stated, the homestead of Mr. Oates, although it was owned by himslf and his wife by the entireties.

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The Court further finds that at the time Mrs. Oates signed the mortgage in question there was a blank unexecuted certificate of acknowledgement appended thereto immediately below the place for signatures and upon the same sheet. This certificate was subsequently executed by the notary public, although Mrs. Oates did not appear before her and make the requisite acknowledgment of the execution of the mortgage, and the mortgage was subsequently filed for record in the office of the Circuit Clerk of Polk County, Florida, and duly recorded. Later the New York Life Insurance Company purchased the note and mortgage from the mortgagee at par value and neither at the time of the delivery of the mortgage to Telfair Stockton & Company nor at the time of delivery by it to the New York Life Insurance Company was either party advised that there was any defect whatsoever in the certificate of execution of the mortgage by the wife, Mrs. Oates, and the said New York Life Insurance Company was therefore purchaser for value before maturity without notice of any defect whatsoever.

The Court further finds that Mrs. Oates did not participate in the reception of that loan or the inception of that loan or the benefit derived from it, neither did Mrs. Oates either by her conduct or by her words induce Telfair Stockton & Company to make the loan to her husband on the faith of the security represented by the mortgage involved in this controversy, nor did she participate in any manner in the transaction by which the loan was secured, but she merely, at the request of her husband, signed the mortgage without knowledge for what purpose it was executed or upon what property it purported to constitute a lien. She was not even aware that the property described was the homestead which was held by her and her husband by the entireties. She did not know that Mr. Oates, after procuring her signature to the mortgage, carried it before a notary public, and, in her absence, caused the certificate of acknowledgement of Mrs. Oates to be made out and signed

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by the notary public and thereupon carried the mortgage to Telfair Stockton & Company and received therefor the

sum of money evidenced by the promissory note, the payment of which the pretended mortgage purports to secure.

Wherefore, this Court is of the opinion that there are no facts and circumstances in this cause presented in the evidence in this cause that would justify invoking the doctrine of estoppel against the defense herein set up by the defendants, Almena Oates and A. Y. Oates; that the mortgage was not properly executed because Mrs. Oates did not appear before the notary public and acknowledge the execution of same; and this Court finds that there is no evidence in this cause which would warrant this Court in finding that Mrs. Oates by her words or deeds authorized her husband to cause the certificate of acknowledgement to be made out in her absence to the end that a loan, as set forth in the instrument, might be procured from the mortgage.

Considerable stress has again been laid by counsel for the complainant in their arguments in this cause on the doctrine argued on the contention presented before Judge Taylor prior to the first decision in this cause, to wit: that even though Mrs. Oates might not be estopped from making the defense sought to be made in this case as against the original mortgagee, Telfair-Stockton and Company she would be estopped from making such defense as against the complainant in this cause because the complainant in this cause was a purchaser for value before maturity of the note and mortgage in question, without notice of any defects or defenses. They base their contention on decisions in other states and on the Florida case of McClure *v.* American Nat. Bank of Pensacola, 67 Fla. 22, 64 So. 427, which I herein refer to as the McClure case. I have thought, though, that the decision in the McClure case was incorrect if its holding is as contended by complainant. To my mind there could be no more reason for estopping Mrs. Oates in behalf of a third party purchaser than there could be from estopping her in behalf of the original mortgagee where, as in this case, the mortgagee knew nothing of any defenses to or defects in the mortgage when the mortgagee accepted same and advanced the money thereon. Certainly the mortgagee put out its money without knowledge of any defects or defenses, and in the firm belief that it had a good and valid note and mortgage, and this is all that could be

said for the complainant who purchased the mortgage from the mortgagee. In fact there might be even more reason for such defense against the purchaser because it is frequently, to say the least, considered the part of wisdom in purchasing a mortgage to ask the mortgagors, or ascertain from them, if the mortgage indebtedness is all right. This is not necessary, but wise, and the course usually followed by an ordinarily prudent person.

In addition to the foregoing, there is the proposition (and this is the reason that I have not heretofore agreed with the decision in the McClure case, if it is as contended by complainant) that nothing can be transferred unless it is in existence. A deed cannot be delivered unless it is executed, and a mortgage cannot be delivered unless it is executed. A mortgage or deed does not exist in law unless it has been executed and delivered, and it is elementary that there can be no transfer of that which has not been executed and delivered. Consequently, since the Supreme Court of Florida, in its decisions holding that a married woman is not estopped, bases same on the theory that to allow her to be so estopped would be to allow the execution of a mortgage contra to the constitution and statutes, and that a mortgage is not executed unless the wife appears before the notary public and acknowledges the execution thereof as required by law, it would follow that a purchaser of such mortgage would be purchasing something that had never been executed, and hence would be the purchaser of nothing and hence would be in no better position than the original mortgagee. If the doctrine of estoppel is to be applied, it must be applied on the basis of an innocent third party putting out money because of the action of the wife in signing the mortgage and making it possible for the husband to take same and place it in circulation by having a valid certificate of acknowledgement made by a notary public and appended thereto, and if it is to be placed on this basis, then undoubtedly it would apply to the mortgagee, who knew of no defects or defenses and paid $15,000 therefor, the same as to the complainant who purchased same from the mortgagee and paid $15,000 therefor, without any knowledge of any defects or defenses.

As stated in the beginning of this opinion, it seems to this Court that the Supreme Court of Florida in its first decision in this cause must be taken to have decided necessarily, in deciding the case as it did, that complainant's being a purchaser for value without notice of any defects would not through estoppel preclude the defense of the wife's non-appearance before the notary, and it seems that the subsequent decisions of the Supreme Court rendered in this cause warrant this conclusion because, though the complainant has again and again attempted to get the Supreme Court to consider this point, and decide the case on this point, the Supreme Court has not seen fit to mention same since the first decision in this case.

At the request of the complainant this Court made a specific finding of fact in the last decree in this cause that the complainant was a purchaser before maturity for value without notice of any defects or defenses, and this point was urged upon the Supreme Court. Consequently if the Supreme Court had not considered that they had settled that question adversely to complainant in the first decision in this cause, they no doubt could have and would have considered same if they had agreed with complainant as to the law, and held that an innocent purchaser for value would be protected regardless of what the law might be as to the original mortgagee, and directed this Court to enter a decree accordingly. Therefore, I do not think there is any merit to this contention in this case.

Wherefore, having duly considered the weight and suffiency of the evidence, this Court does hereby adjudicate the question of estoppel as the same is invoked against Mrs. Oates, and does hereby determine that the evidence in this cause does not disclose that Mrs. Oates by her words or deeds authorized her husband to cause the certificate of acknowledgement to be made out in her absence to the end that a loan as set forth in the instrument might be procured from the mortgagee, and this Court further determines and adjudicates that Mrs. Oates is not estopped under the evidence in this case from setting up and making available to the defendants, the defense that the mortgage is invalid because, as clearly appears from the evidence, she did not

appear before the notary public and acknowledge the execution of the mortgage sought to be foreclosed in this cause, because she did not acknowledge the execution of the mortgage involved in this suit at any time and in any manner, and it is further herein ordered, adjudged and decreed that the equities of this cause are with the defendants, Almena Oates and A. Y. Oates and that the mortgage described in the bill of complaint in this cause and sought to be foreclosed herein, to-wit that certain mortgage made by Almena Oates and A. Y. Oates to Telfair Stockton & Company, dated the 1st day of June 1926 and recorded in Mortgage Book 195, Page 40, of the public records of Polk County, Florida, and assigned by the said Telfair Stockton & Company to the complainants, covering the following real estate in Polk County, Florida, to-wit:

Lots 22 and 23 in Block 2 of Casa Bella, a subdivision of Lakeland, Florida, according to map or plat thereof filed and recorded in Plat Book 8, page 1, public records of Polk County, Florida, said subdivision being sometimes referred to as Everhart and Barnes Second Addition to Lakeland, Florida,

is invalid and void and of no force and effect and that the said mortgage is unenforceable and a nullity and that the complainant is not entitled to foreclose same and that the bill of complaint in this cause be and the same is hereby dismissed at the cost of complainant, which costs are hereby assessed at $.....

Done and Ordered at Chambers in Lakeland, Florida, this the 27th day of September, A. D. 1938.

H. C. PETTEWAY,
Judge of the Circuit Court.

STATE OF FLORIDA,
County of Polk:

Filed For Record this Sept. 28, 1938 at 11:49 A. M. Recorded in Chancery Order Book 100 Page 481 and Record Verified.

D. H. SLOAN, JR., *Clerk Cir. Court.*
L. STIDHAM, *D. C.*

APPENDIX U.

Opinion filed December 22, 1939.

An Appeal from the Circuit Court for Polk County, H. C. Petteway, Judge, Raymond D. Knight, Henry P. Adair, Bradford G. Williams and John M. McNatt, for appellant.

Ira C. Hopper, for Appellees.

Richard P. Marks, Wm. H. Rogers and George A. Pierce, as Amici Curiae.

WHITFIELD, *J.:*

Appellant seeks to enforce a mortgage lien upon homestead real estate held by the entireties, the mortgage being valid on its face and having been assigned to plaintiff for full value and in good faith. The defense is that the wife did not in fact acknowledge before an officer her execution of the mortgage which she signed with her husband. Plaintiff contends for an estoppel because of the misleading conduct of the wife in signing and delivering the mortgage to the husband, which enabled him to procure the official certificate of the wife's acknowledgment to be affixed to the mortgage.

On the last appeal a decree dismissing the bill of complaint was

"reversed with directions to adjudicate the question of estoppel as the same is invoked against Mrs. Oates, and in so doing determine whether the evidence discloses in this case that by her words or deeds she authorized her husband to cause the certificate of acknowledgment to be made out in her absence to the end that a loan, as set forth in the instrument, might be procured from the mortgagee." Oates *v.* New York Life Ins. Co., 130 Fla. 851, 178 So. 570.

Pertinent findings of the Chancellor appear in the statement together with applicable provisions of the constitution and statutes.

The essential question to be determined is whether the husband and the wife are estopped in law from claiming the mortgage to be invalid on the ground that the wife did not acknowledge before any officer the execution of the

mortgage of the homestead real estate held by the entireties. It is made to appear that the husband and the wife each signed the mortgage; that she willingly signed and delivered the mortgage to her husband in the usual course of their conduct in the execution of many other like instruments; that he had the usual legal official certificate of her acknowledgment of such execution affixed to the mortgage by an officer, though she never appeared before the officer; that the husband delivered the apparently duly executed and acknowledged mortgage to the mortgagee and received the loan and made payments thereon for several years; that the mortgagee and the assignee of the note and mortgage for full value before default or maturity, each acquired the note and mortgage without any notice or knowledge whatever that the wife did not in fact appear before the officer who affixed the certificate of her acknowledgment of the execution of the mortgage; that the wife did not challenge the validity of the mortgage or its record until foreclosure began.

Statements of the pleadings in this case and applicable principles of law appear in the New York Life Ins. Co. *v.* Oates, 122 Fla. 540, 166 So. 269, it being there held:

"Where a mortgage on homestead real estate owned and held as an estate by the entireties, appears upon its face and by the appended official certificate to have been executed and acknowledged by the husband and wife in accordance with the requirements of the Constitution and laws of the State, such mortgage instrument is at least *prima facie* valid as an encumbrance upon the property; and the official certificate of due acknowledgment of the execution of the mortgage instrument by the wife, being quasi judicial in its nature, will stand to sustain the validity of the mortgage until it is overcome as may be authorized by law."

"Where in a suit to foreclose such a mortgage, it is admitted or duly proven that the mortgage was signed by both the husband and the wife, but it is averred as a defense that the wife did not appear before or acknowledge the execution of the mortgage before the officer whose certificate states that she did so appear and acknowledge the

execution of the mortgage, then, in the absence of estoppel, such averment as a defense may be proven by convincing evidence. Hutchison *v.* Stone, 79 Fla. 157, 84 So. 151; Randall *v.* Twitchell, 98 Fla. 559, 124 So. 21; Morris *v.* Shepard, 104 Fla. 121, 139 So. 189; Smith *v.* Hogan, 117 Fla. 82, 157 So. 183; Suttle *v.* Wold, 117 Fla. 802, 158 So. 447; Smith *v.* McEwen, 119 Fla. 588, 161 So. 68" (text pp. 555-6).

"A married woman in proper cases may be estopped by her conduct concerning the execution or acknowledgment of instruments affecting real estate in which she is interested. See Maiben *v.* Bobs, 6 Fla. 381; Hobbs *v.* Frazier, 61 Fla. 611, 55 So. 848; Ponce de Leon Fountain of Youth Co. *v.* Day, 90 Fla. 197, 105, So. 814; Phillips *v.* Lowenstein, 91 Fla. 89, 107 So. 350; Mexican Rubber Co. *v.* Ackley, 101 Fla. 552, 134 So. 585; Kansas City Life Ins. Co. *v.* Harroun, 44 Idaho 643, 258 Pac. 929; Ehle *v.* Looker, 182 Mich. 248; Hamling *v.* Aetna Life Ins. Co., 34 F. (2d) 112" (text p. 558).

The doctrine of estoppel was administered by the courts at common law. See Doe *v.* Cropper, 10 Adolph. & Ellis 90; Savage *v.* Foster, 9 Mod. Reports 35. Its proper application is not violative of, but is consistent with, the constitution and statutes of Florida.

"The doctrine of estoppel is a part of the common law that is in force in this state and it should be appropriately applied when the facts in a litigated case justify it." State *v.* Greer, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1398.

The principles of estoppel have long been applied in appropriate proceedings by the Courts of this State as a part of the established jurisprudence.

"While other classes of estoppels have not received much or great favor from the Courts, those *in pais* have been much extended and received a liberal, enlarged and, we might add, an enlightened construction. The technicalities incident to estoppels are gradually giving way to considerations of reason and practical utility, and the Courts of the present day seem disposed to give force and efficacy

to a doctrine which is based upon principles of justice and the purest morality." Camp *v.* Moseley, 2 Fla. 171, t. 197.

"Married woman in proper case may be estopped by her conduct concerning execution or acknowledgment of instruments, affecting real estate in which she is interested." Headnote 9, New York Life Ins. Co. *v.* Oates, 122 Fla. 540, 166 So. 269; McClure *v.* Am. Nat. Bank, 67 Fla. 32, 64 So. 427.

"'The law of estoppel may be briefly" stated "as follows:

'1. Words and admissions, or conduct, acts and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things.

'2. In which the person so speaking, admitting, acting and acquiescing, did so willfully, culpably or negligently.

'3. By which such other person is or may be induced to act so as to change his own previous position injuriously.' (Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.)

"See also Warner *v.* Watson, 35 Fla. 402, 17 So. 654; Johnson *v.* Elliott, 64 Fla. 318, 59 So. 944; First Nat. Bank *v.* Ashmond, 33 Fla. 416, 14 So. 886." New York Life Ins. Co. *v.* Oates, 122 Fla. 540, text 559, 166 So. 269. "Where the facts of the particular case warrant it, the doctrine of estoppel may be applied to married women with reference to conveyances of their separate property."
Headnote 1, Johnson *v.* Elliott, 64 Fla. 318, 59 So. 944.

The provisions of the constitution and statutes regulating conveyances and mortgages of homesteads and other real estate by husband and wife (as shown in the statement) and the statutory requirements for the record of such conveyances and mortgages, sections 5698 (3822) *et seq.*, 5744 (3841) C. G. L., contemplate that such regulations and requirements shall in good faith be substantially complied with for the protection of the interests of all parties; but neither the constitution nor the statutes provide that such conveyances or mortgages shall not be valid or binding on the married woman if the prescribed formulas are not

actually and completely complied with; and the organic and statutory provisions do not intend or contemplate that the required regulations may be so utilized as to mislead those who in good faith acquire such conveyances or mortgages. Nor do the constitution and statutes forbid the application of the principles of estoppel, laches, waiver, acquiescence, or other principles of law in proper cases where conveyances or mortgages are alleged to have been defectively executed or acknowledged by married women or others when adverse interests are involved.

When the prescribed execution and acknowledgment, as shown by the instrument, appear to be regular and legal on their face and there is nothing in or on the mortgage or conveyance or the record thereof to indicate a failure to comply with any of the formal requirements as to the execution, acknowledgment or record of such instruments, other parties may assume the legality of such execution and acknowledgment in the absence of notice or knowledge of any irregularity. The law affords a remedy for misleading conduct of grantors or mortgagors to the injury of grantees and mortgagees, as it does for duress or fraud in procuring the execution or acknowledgment of the instruments in which the grantee or mortgagee participated, or of which they had notice. If such remedies were not afforded the law would operate to create uncertainty and to unsettle titles and contract rights, to do great injustice to innocent parties and to bring discredit upon the procedure provided by the State for executing and acknowledging conveyances and mortgages of real estate, which constitute a most important part of transactions affecting family homes, contract rights and other vital human affairs. The purpose of the regulations and prescribed formulas is to secure certainty and reliability in conveyances and mortgages, not to afford a means of misleading those who execute or acquire conveyances or mortgages of real estate.

The constitution confers upon married women the *right to join* their husbands in executing conveyances and mortgages of homestead real estate and the separate real property of the wife; and the statutes prescribe the manner in which the wife shall acknowledge before an officer her

execution of such conveyances and mortgages, to render such mortgages effectual.

When such a mortgage appears on its face to have been duly and completely executed by husband and wife, and such execution by the wife appears to have been duly acknowledged by her before an authorized officer who duly certifies thereto as required by the statute, such execution and acknowledgment are prima facie sufficient to make the mortgage legal for its purpose as shown by the face of the instrument, and such prima facie validity continues unless invalidity is duly shown in appropriate and timely proceedings. If the wife willingly signs such mortgage with her husband and delivers it to him, thereby enabling him to have it authenticated in her absence, and, because of her signature with her husband's thereto the mortgage is made to appear on its face to be a full and complete compliance with the statutes regulating the execution and acknowledgment of such mortgages, the wife may be estopped to defend against the enforcement of the mortgage lien, *if her conduct with reference to the execution of the mortgage* is such as to justify the application of the doctrine of estoppel to the pleadings and the facts and circumstances of the particular case. See 1 Am. Juris, 385; Karcher *v.* Gans, 13 S. D. 383. In Smith *v.* Hogan, 117 Fla. 82, 157 So. 183, and other like cases, estoppel of the mortgagors was not invoked. See Suttle *v.* Wold, 117 Fla. 802, 158 So. 447. See cases cited in New York Life Ins. Co. *v.* Oates, 122 Fla. 540, 166 So. 269.

In this case the husband and wife owned the property by the entireties. It was their homestead. Menendez *v.* Rodriquez, 106 Fla. 214, 143 So. 223; Oates *v.* New York Life Ins. Co., 113 Fla. 678, 152 So. 671.

The husband solicited the loan from the mortgagee company. There is testimony that the husband said he would have the mortgage duly executed and acknowledged before an officer other than the notary in the mortgagee's office. When the husband presented the note and mortgage, the wife willingly signed and delivered them to the husband as she had done in many previous instances. Under the statute the husband has the care and management of the

wife's property. The husband had the acknowledgment certificate executed by the official when the wife had never appeared before the officer to make the acknowledgment. The mortgagee had no cause to suspect or doubt the regularity and validity of the execution and acknowledgment of the mortgage. The mortgage was recorded with every appearance of due execution and acknowledgment. The note and mortgage were assigned in due course before maturity to plaintiff for full value without anything to suggest any irregularity or invalidity of the mortgage that was legal on its face and duly recorded. Payments were made on the mortgage debt and then there was default in payments after the mortgage had been assigned to the plaintiff.

The wife states she did not know the mortgage covered the homestead; but she signed it because her husband requested her to do so, as he had done in many other like transactions. The signing and delivery to the husband in the course they had pursued in executing several hundred other such documents indicated that she intended the instrument to be made effective in the manner designed by the husband in due course of law and business requirements; and by such intended and willing signing and delivery to the husband, with the character and contents of the instrument open to her inspection or to specific inquiry, she made it practicable for the husband to have the blank certificate of acknowledgment appearing upon the mortgage, signed by the officer and delivered to the husband when the wife was not present and had not appeared before the officer, so that the husband could then deliver it to the mortgagee properly and legally executed and acknowledged on its face. The evidence indicates that the wife was capable of appreciating what her signature meant, and was not misled, deceived or imposed on in any way whatever.

The wife had customarily signed and delivered to her husband papers of a like nature, knowing of course that they were business transactions and that he would do with them what was required to make them effective according to their contents and terms under the law. The note and the mortgage showed a loan was contemplated. If she

signed them without reading them or inquiring as to their contents or legal effect, she knew they were subjects of business transactions and she was accustomed to signing such instruments. In the absence of duress, fraud, mistake or accident, she is in law bound by the contents of the mortgage as far as the law permits her to be. She is by law authorized with her husband to mortgage the real estate held by the entireties, and to join him in mortgaging the homestead real estate.

It is not shown that the wife actually received any of the mortgage money, but she and her husband each had the whole estate by the entireties and each has the right by survivorship to the sole ownership of the entire property. The husband's interest in the property could not be benefited by the mortgage loan without also benefitting the wife's interest in the mortgaged property held by the entireties.

Under the circumstances shown, the wife is, by her conduct in signing and delivering the mortgage to her husband thereby enabling him to make the mortgage effective, estopped in law to impeach the validity of the official certificate of acknowledgment that is legal on its face as a full compliance with the requirements of the constitution and the statutes in the execution of mortgages of homestead real estate and of her interest in the real property held by the entireties.

This merely estops the wife from claiming against the mortgage and leaves the mortgage as it was delivered and recorded, being on its face a complete compliance with the requirements of the constitution and statutes in the premises. The constitution is not violated. Both the husband and the wife signed the mortgage, thereby joining in its execution as required by the constitution. The mortgage is on its face executed and acknowledged, as required by the statute. The wife's conduct in willingly signing and delivering the mortgage to her husband enabled him to have the requisite official certificate to acknowledgment affixed to the mortgage in her absence; and on the evidence in this case the law imputes to the wife knowledge that the mortgage she had signed and delivered was intended

by her husband to be made effective under the law as security for a loan.

Even if Mrs. Oates did not know that the law required mortgages of real estate executed by her to be acknowledged before an officer separate and apart from her husband, and even if she also did not know the mortgage she signed in this instance embraced the homestead, it must be assumed that she did intend the mortgage she signed to be made effective according to its terms. On this record the inference is fair and convincing that, in accordance with her usual course in previously signing many such documents when requested by her husband, she willingly signed the mortgage knowing she was joining her husband in executing an instrument affecting the title to real estate with the tacit understanding on her part that such execution of the instrument was intended by her husband to be made effective for the purpose shown by the contents of the instrument signed by her and by her husband.

The mortgage was, *on its face,* when delivered to the mortgagee and as recorded, properly signed, witnessed and acknowledged by the husband and the wife as required by the constitution and the statutes; and as the wife committed the signed mortgage to the husband for the purpose as intended by him, whom she trusted in all such matters, thereby enabling him to have the required attestation and the official acknowledgment certificate supplied so as to make the mortgage show on its face a complete compliance with the law in its execution and acknowledgment, and as the validity of the mortgage had not been contested by her and had been for several years recognized and acted upon by the husband in receiving the consideration for the mortgage and in paying installments thereon, the wife will not in a court of equity be permitted to now avoid the mortgage by testimony that, though an official certificate of her acknowledgment of the execution of the mortgage before the officer is shown on the mortgage and on the record of it, yet such acknowledgment was not in fact made by her before the officer who made the certificates of acknowledgment. The certificate is in law *prima facie* and presumptively valid to make effective

the mortgage signed by husband and wife, unless and until it is duly shown to be invalid for duress or other cause that may be presented under the law. The plaintiff is the assignee for full value of the note and mortgage and is entitled to the rights the law accords to a bona fide assignee without notice of any latent defect in the apparently duly executed and acknowledged mortgage as shown by the mortgage and by the record of it. See McClure *v.* Am. Nat. Bank, 67 Fla. 32, 64 So. 427; Reasoner *v.* Fisikelli, 114 Fla. 102,—— So. 98.

This decision is not an attempt to nullify or to disregard the requirements of the constitution and the statutes on the subject of the conveyance or mortgage of homestead real estate. The mortgage and the record of it as made shown a complete execution and acknowledgment of the mortgage by the husband and the wife as is required by the statute. They are in law estopped by their conduct to impeach the mortgage upon the facts shown by the record.

The mortgage contract is authorized by law; it is mutual and customary; it has been fully performed by the mortgagee in making the $15,000.00 loan, and it has been performed in part by the mortgagor husband; the bona fide assignee of the mortgagee for full value is entitled to have performance; the law does not forbid complete performance by the mortgagors; equity will not prevent performance on a record justifying an estoppel against the husband and wife mortgagors who seek to have the mortgage adjudged to be void and ineffectual on the ground that the wife did not make the acknowledgment before the officer, though both she and her husband signed the note and the mortgage. There is no duress or fraud involved and the conduct of the mortgagors misled the mortgagee. The bona fide assignee of the note and mortgage for full value is legally and justly entitled to appropriate remedy and relief. This accords with the command of the constitution that "right and justice shall be administered" in the courts "by due course of law." Sec. 4, Declaration of Rights.

In Shad *v.* Smith, 74 Fla. 324, 76 So. 897, the wife was imposed upon and the validity of the conveyance was promptly challenged in the courts.

In Wilkins *v.* Lewis 78, 82 So. 762, and in Phillips *v.* Lowenstein, 91 Fla. 89, 107 So. 350, the husband did not join the married woman in executing the instrument. Estoppel of the married woman was not an issue in Oliver *v.* Sperry, 122 Fla. 428, 165 So. 560.

General statements in opinions in other cases where conveyances or mortgages of real estate executed by husband and wife were involved, necessarily have relation to the facts and issues in those cases, and not to the issue of estoppel as made and contested in this case.

The Decree is Reversed and the Cause Remanded for an Appropriate Decree to be Rendered for Plaintiff.

Terrell, C. J., Chapman and Thomas, J. J., concur.

Brown and Buford, J. J., Dissent.

APPENDIX V.

IN THE SUPREME COURT OF FLORIDA, POLK COUNTY.

June Term, A. D. 1939.

Friday, December 22, 1939.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

This cause having heretofore been submitted to the Court upon the transcript of the record of the decree herein, and the briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is error in the said decree; it is, therefore, considered, ordered and

decreed by the Court that the said decree of the Circuit Court be and the same is hereby reversed; it is further ordered by the Court that the Appellant do have and recover of and from the Appellees its costs by it in this behalf expended, which costs are taxed in the sum of $—, all of which is ordered to be certified to the Court below.

The opinion of the Court in this cause prepared by Mr. Justice Whitfield was this day ordered to be filed.

APPENDIX W.

IN THE SUPREME COURT OF FLORIDA.

January Term, A. D. 1940.

Friday, January 19, 1940.

THE NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

Appellee having filed a petition to recall mandate heretofore issued in this cause and for an allowance of 10 days in which to file a petition for rehearing and for the same time in which to file reply brief, it is ordered that said petition at this stage of the proceedings be treated as an application for supersedeas and as such application be and the same is hereby granted and that all proceedings, orders and decrees of the Court below be stayed until said petition is considered and disposed of by this Court.

(Signed) GLENN TERRELL.

A true copy.
Test.
Clerk Supreme Court.

APPENDIX X.

On the 30th day of January, A. D. 1040, the Court filed its order in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA.

January Term, A. D. 1940.

Tuesday, January 30, 1940.

THE NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellant,*

vs.

A. Y. OATES, and His Wife, ALMENA OATES, *Appellees.*

This cause came on this day to be heard on petition of Appellees for recall of mandate and extension of time within which to file petition for rehearing and for privilege of filing brief and the same having been duly considered by the Court, it is ordered that the said petition be and the same is hereby denied.

A true copy.
Test.
Clerk Supreme Court.

APPENDIX Y.

Final Decree

The above and foregoing cause came on for final hearing after due notice on application of complainant for the entry of a final decree of foreclosure on the mortgage described in the Bill of Complaint in accordance with the Mandate of the Supreme Court of Florida in its latest decision in said cause on appeal and thereupon counsel for defendants filed with the court a motion that the trial court was without jurisdiction to enter a fore-

closure decree as ordered in the said latest decision of the Supreme Court of Florida and that the last final decree heretofore entered by this Court based on the latest decision of the Supreme Court of Florida theretofore is still the final decree in this cause and cannot be changed either by the Supreme Court of Florida or by this Court and the defendants in said motion, for the reasons given, have objected to this Court considering this cause and entering a foreclosure decree as directed. The grounds and reasons for such motion, together with such objections, are contained in the written motion filed in the Clerk's office on February 22, 1940 and presented and filed with this Court at the commencement of this hearing.

Counsel for defendants argue that this Court can and should decline to take further jurisdiction in this cause, for the reason stated in the said written motion and objections, but regardless of the merits of such petition, this court considers that it has a direct order from the Supreme Court of Florida specifically directing this Court to enter a foreclosure decree foreclosing the mortgage in question and that a failure to enter such a decree by this Court would be a violation of a direct and specific order of the Supreme Court of Florida which has not been appealed from or set aside.

Frankly, I have been wholly unable to account for the decision of the Supreme Court of Florida on the last appeal and there may be considerable merit in the contention of the defendants. It would seem that both the law and the facts were definitely and finally settled by the last final decree in this cause and that the law of the case as applied to the facts of the case were definitely and finally settled by the Supreme Court in the next to the last appeal, in the opinion of Mr. Justice Ellis. In the decisions of the Supreme Court prior to the said next to the last appeal, there had never been raised any question of the correctness of the trial court's findings of fact, and in the said decision in the next to the last appeal, there had never been raised any question of the correctness of the trial court's findings of fact, and in the said decision in the next to the last appeal wherein the opinion was written by Mr.

Justice Ellis, the correctness of the findings of fact by the trial judge was assumed and not questioned. In the decisions prior to the next to the last decision, the Supreme Court of Florida, regardless of whether there was a variance in the law as stated in the various decisions, had very carefully not applied the law as laid down in those respective decisions to the facts as established by the trial court and sent the case back in each instance for consideration of the evidence in the light of the general principles of law as enunciated in such decisions, but in the next to the last decision of the Supreme Court wherein Mr. Justice Ellis wrote the opinion, the Supreme Court went further than they had theretofore and in the opinion of this chancellor unquestionably laid down the law and applied the law to the evidence shown by the record and the findings of fact as established by the trial court. If the Supreme Court had merely laid down the general principles of law without applying them to the record of the evidence in the cause in said decision, the matter might possibly have been said to have been left to an unrestricted determination by the trial judge of the questions involved and though the principles as announced in the opinion in said cause were such and are such as in the opinion of this chancellor would preclude any other decision than that entered by the chancellor on the facts in the case, even though the Supreme Court had not applied the law itself to the facts in the case it would seem that since the decision specifically applied the law to the facts in the case, the cause was decided by the Supreme Court and nothing was left for the lower court to do except to enter a decree.

In the opinion of Mr. Justice Ellis in the said next to the last decision of the Supreme Court all the pertinent facts as shown in the record and established by the trial court are referred to in the opinion and specifically pointed out that in the next preceding decision of the Supreme Court thereto the court "Expressly stated that it did not determine whether the evidence justified the findings of the chancellor that the wife did not appear before the officer and did not acknowledge before any officer that she executed the mortgage." I have been wholly unable to agree with that statement in the opinion of Mr. Justice Ellis because it seemed

to this Court prior thereto and still seems to this Court that the findings of fact by the chancellor were not questioned by the decisions of the Supreme Court and were therefore necessarily considered correct, but that the Supreme Court sent the case back to the trial judge to consider said facts in the light of the opinion in that decision on the law. However, Mr. Justice Ellis recognized, and evidently all the other judges recognized, that it was necessary to arrive at such a conclusion in order to be able to reverse the decision of the chancellor at all, and after having referred to the decision of Mr. Justice Whitfield on the said appeal as aforesaid, Mr. Justice Ellis then held on page 576 of the opinion cited in 178 Southern:

"The evidence fully sustains the findings of the chancellor that the wife did not appear before the Notary Public making the certificate of acknowledgment; second, the defense that she did not appear before the Notary Public and did not make an acknowledgment of the execution of the mortgage, and that the property was held by her and her husband by the entireties and constituted their homestead, was established in the opinion of the chancellor by clear and convincing evidence."

Further, after having set out, in substance, all of the evidence in the case and finding that the evidence fully sustained the findings of the chancellor as to the actual physical facts, the opinion of Mr. Justice Ellis continues as follows:

"Third, there is no evidence in this record that the elements of an estoppel, which would operate against Mrs. Oates from denying that she appeared before the notary public and acknowledged the instrument as the law requires, existed."

and then goes on to say that the chancellor evidently was of the same opinion concerning the evidence in the case.

Then Mr. Justice Ellis, in paragraph 5 on page 576 of the said Southern Reporter, said:

"Upon an examination of the record and evidence in this cause, we find that there is a total lack of any authority for the assertion that Mrs. Oates, by her words or her

conduct, authorized her husband or his agent to procure the making of a certificate of acknowledgment by her as the statute requires, nor is there any evidence that she participated in the transaction by which the loan was obtained, or that by any word or act of hers did she induce the mortgagee to believe that it was her purpose to acknowledge before a notary public, as the law requires, the execution of the instrument."

The opinion then goes on to discuss the evidence with reference to other features of the case and to point out from time to time that there was no evidence in the record to justify a finding adversely to the defendants on any of the points which might under the law preclude her from claiming the estoppel.

Concluding, Mr. Justice Ellis said in the said opinion: "Such estoppel can exist, if at all, by a clear, affirmative showing that a married woman by such words or conduct placed herself in the inequitable position of inducing or consenting to the loan, or impliedly authorized her husband to cause the certificate of acknowledgment to be executed and then availed herself of the defense that she did not legally execute the instrument", and then finally, as the concluding opinion of the Court with reference to the law and the facts and the said possibilities of facts that might create an estoppel, the Court said, in paragraph 10 of said opinion:

"Such circumstances did not exist in this case, and the record does not disclose any foundation for envoking the doctrine of estoppel against the defendants. The decree of the chancellor is reversed, with directions to adjudicate the question of estoppel as the same is invoked against Mrs. Oates, and in so doing to determine whether the evidence discloses in this case that by her words or deed she authorized her husband to cause the certificate of acknowledgment to be made out in her absence to the end that a loan, as set forth in the instrument, might be procured from the mortgagee."

From the foregoing, it is very clear that the evidence contained in the record was set out, mentioned and dis-

cussed in said opinion and held not to constitute estoppel or to warrant the application of the doctrine of estoppel.

It is further specifically clear that the said opinion set out specifically, as quoted above, just what possible state of facts could create estoppel and then adjudicate it that "Such circumstances did not exist in this case, and the record does not disclose any foundation for invoking the estoppel against the defendants". Obviously, therefore, the decision was an adjudication on the law and the evidence as contained in the record at the time of said decision and the case was merely sent back to the chancellor to enter a decree in conformity with such opinion.

The only possible loophole left was that if there was other evidence on the question of estoppel that might legitimately be presented before the chancellor, he could have considered same to determine whether or not such additional evidence would bring the case within the requirements laid down in the quoted part of the opinion above to create an estoppel.

Counsel for complainants thereafter attempted to have the chancellor open the cause for the taking of further testimony and introduce such testimony, which motion the Court denied for reasons stated at the time, and so far as this chancellor has been able to find, the said finding was not disturbed by the last opinion of the Supreme Court of Florida on the last appeal.

Consequently, the *facts and evidence* contained in the record at the time of the decision in the last appeal were *identically the facts and evidence* contained in the record when Mr. Justice Ellis wrote his opinion for the Court in the next to the last appeal. There was no other or different evidence in the record, and the Supreme Court had adjudicated in said decision by the said Mr. Justice Ellis that the evidence in the record at that time *did not disclose any foundation for invoking the doctrine of estoppel against the defendants.*

Clearly, therefore, it seems to me that the said decision was an adjudication both as to the law and as to the evidence and as to the law and the evidence as the evidence existed at the time of the said decision by Mr. Justice Ellis. Moreover, Mr. Justice Ellis wrote the aforesaid opinion of

the Court and for the Court and the same was concurred in by Messrs. Justice Whitfield, Terrell, Brown, Buford and Chapman, making the decision unanimous.

I have been wholly unable, therefore, to understand any basis for the last decision of the Supreme Court on the last appeal. It occurs to the Court that there was nothing left for the Supreme Court to decide because it had definitely and finally disposed of the evidence contained in the record by applying the law to that evidence and there has been no change in the evidence. Moreover, the opinion rendered by Mr. Justice Ellis was an unanimous opinion, concurred in by the other five members of the Court and in the last appeal the decree of the chancellor was nevertheless reversed by a four to two decision. It seems to this Court that in the last decision the Supreme Court of Florida must necessarily have overlooked the fact that they not only laid down the general law of estoppel, but applied the law to the evidence in the record when the Supreme Court decided the case and the opinion was written for the Court by Mr. Justice Ellis.

It seems to this Court that the law of this case was settled as above stated in the opinion of Mr. Justice Ellis. There may be considerable merit to the contention of the defendants that such a decision established the law of the case as to the facts of the case and is binding. However, the Mandate of the Supreme Court on the last appeal specifically directed this chancellor to enter a decree of foreclosure, wherefore this Court is of the opinion that this Court should obey that order, and

It is Therefore Hereby Ordered, Adjudged and Decreed as Follows:

1. That there is due the complainant for principal and interest the sum of Thirteen Thousand and Fifty-seven and 96/100 Dollars ($13,057.96) together with interest thereon from the first day of April, A. D. 1930 to the date hereof, at the rate of 8% per annum, in the sum of Ten Thousand Three Hundred Fifty-six and 45/100 Dollars ($10,356.45), making the total sum of Twenty-three Thousand Four Hundred Fourteen and 41/100 Dollars ($23,414.41) due the complainant for principal and interest; there is also due the

complainant the sum of $19.60 for the cost of recertification of the abstract of title; and the further sum of $1,501.75 as a reasonable sum to be allowed for the services of complainant's solicitors in this cause, as and for attorney's fees, and the complainant is further entitled to recover in this action all the costs and expenses incurred and now or hereafter taxed in this suit, including all amounts heretofore or hereafter earned by the Special Master hereunder for his lawful fees and commissions, and that all of these several sums are secured by the lien of said mortgage herein foreclosed, and the said mortgage herein foreclosed is hereby decreed and held to be a valid and subsisting mortgage, and prior and superior to the rights, claims and interests of the defendants in the property hereinafter described and ordered to be sold in default of the payment of the sums so decreed to be due.

2. That unless the defendants herein or someone for them forthwith pay to the Special Master herein the said several sums so decreed to be due and to be paid as aforesaid, and if the several sums mentioned shall not be paid forthwith to the said Special Master, then that the mortgaged property situate in the County of Polk, State of Florida, and described in the Second Amended Bill of Complaint, to-wit:

Lots numbered Twenty-two (22) and Twenty-three (23) in Block numbered Two (2) of Casa Bella, a subdivision of Lakeland, Florida, according to map or plat thereof filed and recorded in Plat Book 8, Page 1, of the Public Records of Polk County, Florida, said subdivision being sometimes referred to as Everhart and Barnes Second Addition to Lakeland, Florida,

be sold to pay and satisfy such sums by said Special Master at public outcry to the highest and best bidder or bidders for cash on some legal sales day of this Court during the legal hours of sale in front of the front door of the Polk County Court House, in the city of Bartow, County of Polk, State of Florida.

3. That J. W. Howell, Esquire, a practicing solicitor of this Court, be and he is hereby appointed as Special Master

herein to execute this Decree, and that such Special Master is directed to advertise the sale to be made under this Decree, by causing notice of the time and place thereof, together with the foregoing description of the mortgaged lands and premises, to be sold hereunder, to be published once each week for four (4) consecutive weeks prior to the date of such sale in a newspaper published in the said County of Polk, State of Florida.

4. That upon such sale being made as aforesaid, the Special Master shall collect and reduce to possession the proceeds of such sale, and that the complainant herein is hereby permitted and allowed at such sale to bid as it may be advised on the property to be sold at such sale, and that if the complainant shall be the purchaser of such property at such sale, the Special Master aforesaid is authorized and directed to allow and credit the complainant on said bid for such property at such sale the sums due and payable to it by the defendants under this decree, or such portions thereof as may be necessary or required to fully pay its bid for said property.

5. That out of the proceeds of such sale, the Special Master aforesaid shall first pay:

(a) All costs and expenses of these proceedings, including his own fees for such sale and including the fees allowed the complainant for the services of its solicitors herein;

(b) The amount hereinabove found to be due complainant for principal and interest, viz., Twenty-three Thousand Four Hundred Fourteen and 41/100 Dollars ($23,414.41) and the further sum of Nineteen and 60/100 Dollars ($19.60) for the cost of recertification of the abstract of title, together with interest on said sums from the date hereof at six per centum (6%) per annum to the date of said sale, and that in the event of any excess of such proceeds of sale over and above the amounts necessary to make the payments aforesaid, such overplus, if any, shall be paid into the Registry of the Court to await its further order herein, and that in case of any deficiency of such proceeds of sale, the Special Master aforesaid shall apply the same in the order specified

above as far as the same will apply, making notice and report of such deficiency and amount thereof in his report of the same to this Court.

6. That upon the sale being made as aforesaid, the Special Master herein shall forthwith report the same, and all of his acts and doings in connection with the execution of this decree, to this Court, for confirmation and approval thereof.

7. That upon such sale being made as aforesaid, and upon the confirmation thereof by this Court, the defendants, A. Y. Oates and Almena Oates, his wife, and all other persons having or acquiring any interest in said mortgaged property since the commencement of this suit, and all persons claiming by, through or under said defendants, or any of them, all and singular, be forever barred and foreclosed of and from any and all right, title, interest or equity of redemption in the mortgaged property aforesaid, and every part thereof, and the Special Master shall execute and deliver a good and sufficient deed conveying said lands to the purchaser at such sale, and that upon the production of said Special Master's deed and a copy of this decree, all persons in possession of said property, or any part thereof, do surrender and deliver up the same to the purchaser at such sale, or to his agent or servants thereunto duly authorized.

8. That this Court hereby retains jurisdiction of this cause and grants permission to the complainant to apply to this Court for such further orders and decrees herein as may be equitable and necessary.

Done and Ordered in Chambers in Lakeland, Polk County, Florida, this the 1st day of March, A. D. 1940.

H. C. PETTEWAY,
Judge of the Circuit Court.

APPENDIX Z.

IN THE SUPREME COURT OF FLORIDA.

Polk County (Fifth Appeal).

June Term, A. D. 1940.

En Banc.

A. Y. Oates and Almena Oates, His Wife, Appellants,

vs.

New York Life Insurance Company, a Corporation, Appellee.

Opinion filed November 12, 1940.

An Appeal from the Circuit Court for Polk County, H. C. Petteway, Judge, Ira C. Hopper, Emory E. Walker and J. Lewis Hall, for Appellants; Bradford G. Williams, Raymond D. Knight, Henry P. Adair and John M. McNatt, for Appellee.

Per Curiam:

This suit was brought in the Circuit Court for Polk County, Florida, to foreclose a mortgage lien upon homestead property held by husband and wife by the entireties, the defense being that the wife's execution of the mortgage was not acknowledged by her beofre an officer as required by the statute. Section 5676 (3803) C. G. L. The wife signed the note and mortgage, and the officer's certificate states that she acknowledged before him the due execution of the mortgage by her.

The decree appealed from was for plaintiff and was reversed for error in striking evidence as to whether the married woman duly acknowledged the execution of the mortgage. Oates *v.* New York Life Ins. Co., 113 Fla. 678, 152 So. 671.

The second appeal was from a final decree for the defendants, estoppel being one of the issues. The opinion of

this Court discussed the principles of law applicable to estoppel by conduct of the married woman who signed the mortgage to deny that she acknowledged the execution of the mortgage before the officer whose certificate of her acknowledgment was a part of the mortgage instrument when it was delivered to the mortgagee. Such an issue of estoppel had not been decided in any previous case in this Court. The decree appealed from was reversed without prejudice, "with directions that the whole cause be remanded to the Circuit Court for further consideration and disposition, after a full rehearing and reconsideration of all the issues of law and fact in the light of the opinion of this Court hereinbefore approved by a majority of the Court as the applicable law of this case to be considered and applied in its disposition." New York Life Ins. Co. *v.* Oates, 122 Fla. 540, text pages 552, 566, 166 So. 269, text pages 273, 279.

On the third appeal from a final decree for the plaintiff, the opinion discussed the evidence and the law; and, as it appeared that though the Chancellor had discussed the evidence and made findings on the question of estoppel, he had not *adjudicated* the issue of estoppel; and as this Court has only appellate jurisdiction in chancery matters, the Court would not anticipate a *decision* of the chancellor on the issue of estoppel; and at the conclusion of the discussion in the opinion this Court rendered its appellate decree as follows:

"The decree of the Chancellor is reversed with directions to adjudicate the question of estoppel as the same is involved against Mrs. Oates, and in so doing determine whether the evidence discloses in this case that by her words or deed she authorized her husband to cause the certificate of acknowledgment to be made out in her absence to the end that a loan, as set forth in the instrument, might be procured from the mortgagee. Reversed." Oates *v.* New York Life Ins. Co., 130 Fla. 851, 178 So. 570.

The fourth appeal was from a final decree adjudicating the issue of estoppel against the contentions of plaintiff and dismissing the foregoing suit New York Life Ins. Co. *v.* Oates, 141 Fla. 164, 192 So. 637.

The opinion of this Court on the fourth appeal contains the following:

"Under the circumstances shown, the wife is, by her conduct in signing and delivering the mortgage to her husband thereby enabling him to make the mortgage effective, estopped in law to impeach the validity of the official certificate of acknowledgment that is legal on its face as a full compliance with the requirements of the constitution and the statutes in the execution of mortgages of homestead real estate and of her interest in the real property held by the entireties."

"This merely estops the wife from claiming against the mortgage and leaves the mortgage as it was delivered and recorded, being on its face a complete compliance with the requirements of the constitution and statutes in the premises. The constitution is not violated. Both the husband and the wife signed the mortgage, thereby joining in its execution as required by the constitution. The mortgage is on its face executed and acknowledged, as required by the statute. The wife's conduct in willingly signing and delivering the mortgage to her husband enabled him to have the requisite official certificate to acknowledgment affixed to the mortgage in her absence; and on the evidence in this case the law imputes to the wife knowledge that the mortgage she had signed and delivered was intended by her husband to be made effective under the law as security for a loan."

"Even if Mrs. Oates did not know that the law required mortgages of real estate executed by her to be acknowledged before an Officer separate and apart from her husband, and even if she also did not know the mortgage she signed in this instance embraced the homestead, it must be assumed that she did intend the mortgage she signed to be made effective according to its terms. On this record the inference is fair and convincing that, in accordance with her usual course in previously signing many such documents when requested by her husband, she willingly signed the mortgage knowing she was joining her husband in executing an instrument affecting the title to real estate with the tacit understanding on her part that such execu-

tion of the instrument was intended by her husband to be made effective for the purpose shown by the contents of the instrument signed by her and by her husband."

"The mortgage was, on its face, when delivered to the mortgagee and as recorded, properly signed, witnessed and acknowledged by the husband and wife as required by the constitution and statutes; and as both the husband and the wife intentionally signed the mortgage; and as the wife committed the signed mortgage to the husband for the purpose as intended by him, whom she trusted in all such matters, thereby enabling him to have the required attestation and the official acknowledgment certificate supplied so as to make the mortgage show on its face a complete compliance with the law in its execution and acknowledgment, and as the validity of the mortgage had not been contested by her and had been for several years recognized and acted upon by the husband in receiving the consideration for the mortgage and in paying installments thereon, the wife will not in a court of equity be permitted to now avoid the mortgage by testimony that, though an official certificate of her acknowledgment of the execution of the mortgage before the officer is shown on the mortgage and on the record of it, yet such acknowledgment was not in fact made by her before the officer who made the certificate of acknowledgment. The certificate is in law prima facie and presumptively valid to make effective the mortgage signed by husband and wife, unless and until it is duly shown to be invalid for duress or other cause that may be presented under the law. The plaintiff is the assignee for full value of the note and mortgage and is entitled to the rights the law accords to a *bona fide* assignee without notice of any latent defect in the apparently duly executed and acknowledged mortgage as shown by the mortgage and by the record of it. See McClure *v.* American Nat-Bank, 67 Fla. 32, 64 So. 427; Reasoner *v.* Fisikelli, 114 Fla. 102, 153 So. 98."

"This decision is not an attempt to nullify or to disregard the requirements of the constitution and the statutes on the subject of the conveyance or mortgage of homestead real estate. The mortgage and the record of it as made show a complete execution and acknowledgment of

the mortgage by the husband and the wife as is required by the statute. They are in law estopped by their conduct to impeach the mortgage upon the facts shown by the record."

"The mortgage contract is authorized by law; it is mutual and customary; it has been fully performed by the mortgagee in making the $15,000 loan, and it has been performed by the mortgagee in making the $15,000 loan, and it has been performed in part by the mortgagor husband; the *bona fide* assignee of the mortgage for full value is entitled to have performance by the mortgagors; equity will not prevent performance on a record justifying an estoppel against the husband and wife mortgagors who seek to have the mortgage adjudged to be void and ineffectual on the ground that the wife did not make the acknowledgment before the officer, though both she and her husband signed the note and the mortgage. There is no duress or fraud involved and the conduct of the mortgagors misled the mortgagee. The *bona fide* assignee of the note and mortgage for full value is legally and justly entitled to appropriate remedy and relief. This accords with the command of the constitution that 'right and justice shall be administered' in the courts 'by due course of law'. Sec. 4, Declaration of Rights.

* * * * * * *

"The decree is reversed and the cause remanded for an appropriate decree to be rendered for plaintiff."

The present appeal is from a final decree for the plaintiff rendered pursuant to the decree of this Court on the last preceding appeal as stated above.

Before the final decree here appealed from was rendered by the Chancellor, counsel for the mortgagor defendants, by motion challenged the jurisdiction of the Chancellor to render the decree required by the decree of this Court; alleging in effect that the law of the case was settled on the third appeal in favor of the defendants, and that this Court could not thereafter direct a decree for the plaintiff on the fourth appeal as above shown.

The contention is not well founded for the reason that on the third appeal the Chancellor had not *adjudicated* the issue of estoppel; and as this Court has only appellate jurisdiction in chancery cases, the opinion on the third appeal (130 Fla. 851) discussed the facts and the law, but did not then adjudicate the issue of estoppel, because it had not been adjudicated by the Chancellor; but by its appellate decree evidenced by the mandate issued thereon, this Court reversed the decree from which the third appeal was taken "with directions to adjudicate the question of estoppel," as shown in the quotations above.

The mandate of this Court on the fourth appeal directed the Chancellor below, in part, to enter a decree for the plaintiff. On March 1, 1940, the lower court entered a final decree for the plaintiff, and from said final decree the defendant below appealed and the case makes its appearance here for the fifth time. The appellee filed a motion to dismiss the fifth appeal on grounds, in part, viz: (a) the appeal is frivolous; (b) it clearly appears from the record that the decree should be affirmed; (c) every material point raised has been adjudicated.

The fifth appeal was heard by this Court on the motion to dismiss and on the merits on briefs and oral argument of counsel for the respective parties. Counsel for appellants contend that "the law of the case" was settled and fixed by the opinion prepared by Mr. Justice Ellis and adopted by this Court and reported in 130 Fla. 851, 178 So. 570, commonly referred to as the third appeal. It is contended by counsel for appellee that "the law of the case" was not settled by this Court in the third appeal, but at the most it directed the Chancellor to determine from the evidence the question of estoppel on the part of Mrs. Oates, and the Chancellor made his finding from the evidence that Mrs. Oates was not estopped and dismissed the suit, and that on the fourth appeal here the findings of fact and the adjudication thereon as made by the Chancellor and the dismissal of the suit were by this Court reversed and a mandate issued directing the entry to a final decree for the plaintiff and that the "law of the case" was settled by this Court on the fourth appeal. See New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637.

Counsel for appellants, in support of their contention that "the law of the case" was settled by the opinion of Mr. Justice Ellis on the third appeal, cite Family Loan Co. v. Smetal Corp., 123 Fla. 900, 169 So. 48; Palm Beach Estates v. Croker, 106 Fla. 617, 143 So. 792; Utley v. City of St. Petersburg, 121 Fla. 268, 163 So. 523, and other Florida cases. Likewise, that after the law of the case was settled, this Court was without power to change the law of the case in a subsequent opinion, and, if the law of the case was changed as intimated here on the fourth appeal, then the appellants have been denied due process of law. South Florida Trust Co. v. Miami Coliseum Corp., 101 Fla. 1351, 133 So. 334; 12 Am. Jur., Sec. 633, page 324. We are fully in accord with the law appearing in the cited authorities.

It is our conclusion that "the law of the case" was not settled by the opinion of Mr. Justice Ellis and adopted by this Court on the third appeal, but on the other hand, "the law of the case" was settled and fully determined by this Court on the fourth appeal as reported in 141 Fla. 164, 192 So. 637. We are unable to appreciate the contention that a vested right was acquired under the law as enunciated by this Court in the third appeal so as to deprive them of fundamental rights. See King *v.* State of West Virginia, 216 U. S. 92, 30 Sup. Ct. 225, 54 L. Ed. 396; Moss *v.* Ramey, 239 U. S. 538, 36 Sup. Ct. 183, 60 L. Ed. 425; Rooker *v.* Fidelity Trust Co., 261 U. S. 114, 43 Sup. Ct. 288, 67 L. Ed. 556.

We fail to find error in the record and the final decree appealed from is hereby affirmed.

Terrell, C. J., Whitfield and Chapman, J. J., concur.

Brown, J., concurs in judgment of affirmance.

Thomas, J., agrees to conclusion.

Buford, J., dissents.

APPENDIX AA.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1940.

Saturday, December 7, 1940.

A. Y. Oates and Almena Oates, His Wife, Plaintiffs in Error,

vs.

New York Life Insurance Company, a Corporation, Defendant in Error.

Counsel for Plaintiffs in Error having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby denied.

A true copy.

Test:

Clerk Supreme Court.

APPENDIX BB.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1940.

Thursday, December 19, 1940.

A. Y. Oates and Almena Oates, His Wife, Appellants,

vs.

New York Life Insurance Company, a Corporation, Appellee.

Counsel for Appellants having filed petition in this cause for supersedeas, recall of mandate and stay order

to preserve the rights of Appellants for such time as is necessary to enable Appellants to make application to the Supreme Court of the United States for writ of certiorari in said cause and for order fixing the amount, terms and conditions of any bond required by appellants in the premises, it is ordered that said petition be and the same is hereby granted and that the judgment herein be stayed until the further order of this Court and that the mandate in this cause be returned to this Court, and that A. Y. Oates and Almena Oates do give a good and sufficient bond in the sum of $250.00, with surety or sureties thereon approved as required by law or the rules of Court, conditioned to diligently prosecute their said certiorari proceeding to a final determination, and further conditioned that in the event that said cause is dismissed or said petition denied by the Supreme Court of the United States, or decided adversely to their contention and the judgment of this Court be affirmed, then in that event, to pay all costs that may have been incurred or accrued in said proceeding.